Ryder Truck Rental, Inc., d/b/a Ryder Transportation Services *and* District Lodge No. 90, International Association of Machinists & Aerospace Workers, AFL-CIO, a/w International Association of Machinists and Aerospace Workers, AFL–CIO and Otis E. Carpenter. Cases 25–CA–27551–1 and 25–CA–27705–1

April 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On August 2, 2002, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent and the General Counsel each filed exceptions, a supporting brief, and an answering brief. The Respondent also filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs, and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by requesting that employees report to management employees who, in advocating the Union, "harass" other employees. We agree.

The record establishes that soon after the Union began its organizing campaign in November 2002, three employees reported to the Respondent's service team leader, Richard Woehlke, that fellow employee Tim Bullman had solicited their signatures for the Union, and that they felt that Bullman was harassing them. Woehlke instructed the three employees that if they felt that they were being harassed concerning the Union, they needed to put it in writing and then come to see him.

In finding that Woehlke's directive to the employees violated Section 8(a)(1), the judge stated that Woehlke's directive came in response to a vague claim of harassment in connection with the description of Bullman's union solicitation. The judge added that, in view of the fact that news of union activity traveled fast in this small unit, it was likely that this directive was passed on to other bargaining unit members. The judge further found that Woehlke's directive was significant when considered in the context of the strong antiunion atmosphere created by the Respondent's other unfair labor practices (i.e., numerous violations of Section 8(a)(1) and (3) of the Act).

We agree with the judge's finding. It is well settled that the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited. E.g., *Bank of St. Louis*, 191 NLRB 669, 673 (1971), enfd. 456 F.2d 1234 (8th Cir. 1972). To that end, an employer's invitation to employees to report instances of "harassment" by employees engaged in union activity is violative of Section 8(a)(1). E.g., *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979). Here, in response to nothing more than a vague claim of "harassment" in connection with an employee's union solicitation, Woehlke directed employees to document in writing the specifics of that employee's union activity. Clearly, employees who learned of this directive, and of the circumstances upon which it was given, could reasonably believe that the Respondent was seeking written documentation of its employees' lawful Section 7 activity.

[1] There are no exceptions to the judge's findings that the Respondent (a) violated Sec. 8(a)(1) of the Act by disparaging employee Tim Bullman because of his union activity and by creating the impression of surveillance of Bullman's union activity; (b) violated Sec. 8(a)(1) of the Act by threatening employee Otis Carpenter with discharge; and (c) violated Sec. 8(a)(4) and (3) of the Act by suspending and thereafter issuing a final warning to Carpenter because he engaged in union activity and gave an affidavit to the National Labor Relations Board. There also are no exceptions to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by (a) instructing its employees to make a final group decision about the Union; (b) by creating the impression of surveillance at a January 17, 2000 employee meeting; and (c) by certain remarks attributed to the Respondent's director of employee labor relations, William Herlihy, on January 11, 2001.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by discharging employee Tim Bullman, we do not rely on the judge's finding that the Respondent's technician-in-charge, Carl Chitwood, testified that he might not have reported the incident in which Tim Bullman used the wrong filter if it had not involved a major customer. Chitwood actually testified that he "probably" would have reported the incident if it had not been a crucial customer, but "that was the main reason I [reported] him." However, this statement by Chitwood was not critical to the judge's conclusion that the discharge was unlawful. Rather, it was just one of many facts on which the judge relied in concluding that the Respondent's asserted reason for discharging Bullman was pretextual. We find that the conclusion is supported without regard to the mischaracterization of Chitwood's testimony.

Our dissenting colleague contends that Woehlke's conduct did not violate the Act because Woehlke did not solicit employees to report such conduct, but rather merely asked that the unsolicited report of harassment be put in writing. Our colleague contends that this was an appropriate response to an allegation of harassment. We disagree. As in *Liberty House*, supra, the Respondent here requested employees to report activity that they "felt" constituted harassment concerning the Union. Such statements have been found to be unlawful because they have a chilling effect on employees' exercise of their Section 7 rights. See, e.g., *Hawkins-Hawkins Co.*, 289 NLRB 1423 (1988) (statement that "if anyone was harassed by the Union or by fellow employees to contact management and they would take care of it" violated Sec. 8(a)(1)); *W. F. Hall Printing Co.*, 250 NLRB 803, 804 (1980) (statement that if "any employee should harass you or try to pressure you into signing a card, feel free to report it" violated Sec. 8(a)(1)). In addition, the Board has found unlawful an employer's solicitation of reports of harassment after receiving employee complaints about union solicitation. See *Chem Fab Corp.*, 257 NLRB 996, 1003 (1981), enfd. 691 F.2d 1252 (8th Cir. 1982). Whether or not the Respondent's request to report "harassment" is made in response to employee complaints such conduct has the "potential dual effect of encouraging employees to report to Respondent the identity of union card solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees, and of correspondingly discouraging card solicitors in their protected organizational activities." *Arcata Graphics*, 304 NLRB 541, 542 (1991). Thus even if, as contended by our dissenting colleague, the Respondent was merely asking employees to put in writing an unsolicited report of harassment, the request to report subjective harassment "could be interpreted by some employees to be broad enough to cover lawful attempts by union supporters to persuade employees to sign union cards"[3] and could reasonably be construed by employees as an attempt by the Respondent to document an employee's Section 7 activities. We agree with the judge that this request "would have the foreseeable consequence of restraining union proponents from attempting to persuade other employees to support the union." Accordingly, we find that the statement violated Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ryder Truck Rental, Inc., d/b/a Ryder Transportation Services, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. April 30, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part, concurring in part.

1. Contrary to my colleagues and the judge, I do not find that the Respondent violated Section 8(a)(1) when its service team leader, Richard Woehlke, instructed employees, who felt that they were being harassed concerning the Union, to make a written report of that conduct.

There is no dispute as to the facts. Soon after the union campaign started, three employees approached Woehlke and told him that fellow employee Tim Bullman had harassed them in his solicitation of their signatures on union petitions. Woehlke told the three employees that, if they felt that they were being harassed by the Union, they should describe the events in writing and come to him.

I find no violation. Although solicitation activity is generally protected, there is a point at which such solicitation objectively becomes unprotected harassment.[1] That line can be difficult to discern, both as a matter of fact and law. In the instant case, Woehlke did not invite the employees' complaints. The employees came to him. Obviously, it would be imprudent to ignore such employee complaints. On the other hand, a series of pointed questions could intrude into conduct that might turn out to be protected. A reasonable middle ground is to simply ask the employees to state what happened to them. And, by asking that this be done in writing, the employer can minimize the possibility of misunderstanding. This is precisely what Woehlke did. I would not condemn his response as unlawful.

The cases cited by my colleagues are clearly distinguishable. In *Bank of St. Louis*, 191 NLRB 669, 673 (1971), enfd. 456 F.2d 1234 (8th Cir. 1972), the employer sent a letter to all employees inviting all of them to report incidents of "pestering" to the employer. Woehlke, on the other hand, did not issue any broad pro-

[3] *Arcata Graphics*, supra, 304 NLRB at 542.

[1] See, e.g., *BJ's Wholesale Club*, 318 NLRB 684 fn. 2 (1995).

nouncement. He simply responded to the complaining employees in a manner that ensured that there would be no inappropriate discussion about lawful Section 7 activity. In *Liberty House Nursing Homes*, 245 NLRB 1194, 1197 (1979), an employer sua sponte instructed an employee to report anyone who was harassing her to vote or not vote for the Union. Unlike the comment at issue in *Liberty House*, Woehlke's comment here was not sua sponte, but rather was a direct and narrowly tailored response to an unsolicited complaint of harassment. Similarly, neither *Hawkins-Hawkins Co.*, 289 NLRB 1423 (1988), nor *W. F. Hall Printing Co.*, 250 NLRB 803 (1980), involved a narrowly tailored response to an unsolicited complaint of harassment. *Hawkins-Hawkins* involved an employer's sua sponte statement to employees that they should contact management if they were harassed by the union. *W. F. Hall Printing Co*., supra, involved an employer's sua sponte statement, contained in a letter to employees, asking them not to sign a union authorization card and to contact management if anyone is harassed or pressured to sign a card. Further, *Chem Fab Corp.*, 257 NLRB 996, 1002–1003 (1981), enfd. 691 F.2d 1242 (8th Cir. 1982), did not involve a narrowly tailored response to a specific complaint of harassment. Rather, the statement found unlawful in that case involved an employer's "broadly worded" statement to all its employees that "[I]f you feel you are being harassed [by prounion people], simply report it to your supervisor and we will take it from there." Finally, in *Arcata Graphics*, 304 NLRB 541 (1991), an employer distributed a letter to employees (purportedly in response to concerns raised by employees) that generally invited *any* of them to notify the employer if they are subjected to abusive treatment to sign a union authorization card. Thus, there was no attempt—as here—to minimize the possibility that employees would construe the statement as one pertaining to lawful Section 7 conduct.

2. I agree with my colleagues' adoption of the judge's other findings of violations, except as follows. First, in adopting the judge's finding that the Respondent's vice president of operations, Roger Cicchini, violated Section 8(a)(1) by soliciting employee grievances and promising to remedy them, I rely only on the fact that Cicchini departed from the Respondent's past practice with respect to resolving employee grievances, as set forth in the Respondent's corporate guidelines. I find it unnecessary to pass on the other reasons relied on by the judge in finding the conduct unlawful. Second, inasmuch as I adopt the judge's finding that the Respondent violated Section 8(a)(1) when its director of employee relations, William Herlihy, threatened employees with loss of benefits if the Union was brought in, I find it unnecessary to pass on the judge's other findings of unlawful threats of loss of benefits, because such findings are cumulative and do not affect the remedy.

Dated, Washington, D.C. April 30, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

Joanne C. Mages, Esq. and *Derek Johnson, Esq.*, for the General Counsel.

Joshua Frank, Esq., of Miami, Florida, for the Respondent.

Daniel Emerson, Esq. and *Andrew M. McNeil, Esq.*, of Indianapolis, Indiana, for the Respondent.

Roger N. Nauyalis, Grand Lodge Representative of Westchester, Illinois, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Indianapolis, Indiana, on December 10–13, 2001. The charge in Case 25–CA–27551–1 was filed by District Lodge No. 90, International Association of Machinists & Aerospace Workers, AFL–CIO, a/w International Association of Machinists & Aerospace Workers, AFL–CIO (the Machinists or the Union). Otis E. Carpenter, an individual, filed the charge in Case 25–CA–27705–1. Both charges were filed against Ryder Truck Rental, Inc. d/b/a Ryder Transportation Services (Respondent). The charges resulted in the issuance of a consolidated complaint against Respondent alleging that it violated Section 8(a)(1) of the Act by: instructing its employees to report any employee activities on behalf of the Machinists; soliciting grievances from employees and promising improved terms and conditions of employment if they rejected the Machinists; threatening employees with loss of vacation benefits, and that negotiations would start from zero if they selected the Machinists; informing employees that they would receive increased vacation benefits if they rejected the Machinists; creating the impression of surveillance of employees' union activities; disparaging employees because they supported the Machinists; requiring its employees to attend a captive audience meeting, and instructing them to make a final group decision concerning the Machinists; informing employees increased vacation benefits were rescinded because the employees supported the Machinists; threatening employees with discharge because they supported the Machinists; and threatening employees with discharge because they gave an affidavit to the Board. The consolidated complaint alleges that Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Alan Feldscher and Tim Bullman, and that Respondent violated Section 8(a)(1), (3), and (4) of the Act by suspending and issuing a final written warning to employee Otis Carpenter. The consolidated complaint alleges that a majority of employees at Respondent's Indianapolis East and West facilities designated the Machinists as their collective-bargaining representative as of November

21, 200(0) (sic) in an appropriate bargaining unit, and seeks a bargaining order for the Union since that date as a result of Respondent's unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, engages in truck leasing and logistics at its facilities in Indianapolis, Indiana, where it annually receives goods valued in excess of $50,000, directly from points outside the State. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Machinists and the Chauffeurs, Teamsters, Warehousemen, and Helpers Local Union No. 135, a/w International Brotherhood of Teamsters, AFL–CIO (Teamsters Local 135) are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent is a large operation, headquartered in Miami, Florida, with locations throughout the United States.[1] Challis Lowe is Respondent's senior vice president of employee relations. Bill Vyreck, group director of labor/employee relations, reports to Lowe. William Herlihy, director of employee labor relations, reports to Vyreck.[2] Roger Cicchini was vice president of operations and Edward Buckley was the senior manager of human resources for Respondent's east central region during the period of November 2000 through April 1, 2001. At that time, the east central region included Kentucky, Ohio, Indiana, and parts of Tennessee.[3] The east central region had about 1600 to 2000 employees and was composed of seven customer business units (CBUs) incorporating 80 to 90 facilities, of which eight had collective-bargaining agreements. The Indianapolis CBU had about 10 locations, including Indianapolis North, East, and West, which are at issue here. One general manager (GM) is in charge of each CBU, and there are between two to four customer service representatives (CSMs) per CBU, who report to the GM. Michael Campanale became the GM for the Indianapolis CBU around the last week in November. Dave Toneges is one of two CSMs reporting to Campanale. Toneges' supervisory responsibilities include the three Indianapolis facilities and Respondent's Terre Haute facility. Richard Woehlke is a service team leader (STL) at the Indianapolis North facility. Woehlke transferred to that location in March 2001. Prior to that time, Woehlke was the STL at the Indianapolis West facility. Woehlke reports to Toneges.[4]

The Machinists attempt to organize the Indianapolis East and West facilities led to the filing of one of the unfair labor practice charges at issue here, and alleged statements to and the discipline of Teamsters' union steward, Carpenter, at the Indianapolis North facility led to the filing of the other charge. As of November 21, there were about 18 employees at Indianapolis East, 17 at Indianapolis West, and 20 at Indianapolis North. The three facilities perform service and maintenance on Respondent's rental and lease trucks. They are staffed by service island attendants (SEs), and T–1 to T–4 technicians, with T–4 the highest skill level.

A. The Machinists Alleged Majority Status

Towards the end of 2000, Tim Bullman, a T–3 technician working at Respondent's Indianapolis West facility, contacted a technician at one of Respondent's Cincinnati shops where there was a Machinists collective-bargaining agreement.[5] Bullman learned that the Cincinnati technicians had higher hourly rates than the employees at Bullman's facility. Bullman contacted Machinists Business Representative John Silhavy in November 2000, and Silhavy met Bullman and employee Chad Luster on November 16. Bullman and Luster signed a Machinists petition[6] on that date, which reads at the top that:

---

[1] All dates are in the year 2000, unless otherwise specified.

[2] There are two other individuals in Respondent's employ with Herlihy's title and the country is divided into thirds as to their areas of responsibility.

[3] Respondent underwent a reorganization around April 1, 2001, at which time Cicchini became the vice president of operations for the north central region. At that time, Cicchini's jurisdiction no longer included the facilities at issue here. Greg Roper replaced Buckley for the region covering the Indianapolis facilities at the time of the April 1, 2001 reorganization.

[4] Respondent admits that Herlihy, Cicchini, Buckley, Roper, Campanale, Toneges, Woehlke, and Technical Team Leader Gerald Hamilton are statutory supervisors and agents within the meaning of Sec. 2(11) and 2(13) of the Act.

[5] Bullman and Feldscher's discharges are alleged to be violative of the Act. The General Counsel drew much of the testimony concerning what transpired at company meetings and events leading up to the discharges from Bullman and Feldscher. I found Bullman and Feldscher, considering their demeanor, admissions by Respondent's witnesses, the content of their testimony, and the record as a whole, to be reliable witnesses to the extent that their memories would permit and have credited them as set forth in the body of this decision. Each candidly admitted, against their own interest, taking the action Respondent asserts lead to their discharge. In this regard, Bullman admitted failing to restart an engine leading to an oil leak, although he had stated in a preventative maintenance (PM) report that he had restarted the engine and Feldscher admitted to not wearing safety glasses on the date he was accused of that indiscretion. On the other hand, considering their demeanor, I found the testimony of Respondent's witnesses Herlihy, Buckley, Campanale, Toneges, and Woehlke to be marked by vague recollection, to be inconsistent between witnesses, to contradict prehearing affidavits, to be somewhat exaggerated in order to support Respondent's position, and for the most part not to be worth of belief. However, my failure to credit certain aspects of a witness' testimony does not mean that I do not credit all of their testimony. See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950). In particular, I have relied on certain admissions by Respondent's witnesses at the hearing and in prehearing affidavits for affirmative findings. In making credibility resolutions, I have reviewed the complete record, and observed the demeanor of all witnesses. Testimony in contradiction to that which my factual findings are based has been considered but discredited. As necessary, specific credibility resolutions will be discussed in more detail in the body of this decision.

[6] Respondent stipulated to the authenticity of Bullman and Luster's signature.

> We believe that only through collective bargaining can we have a voice in our work place, achieve fair treatment for all, establish seniority and better benefits, wages and working conditions. Therefore, this will authorize the International Association of Machinists and Aerospace Workers, AFL–CIO to represent me in collective bargaining with my employer. This will also authorize the union to use my name for the purpose of organizing Ryder Transportation Services.

Each page of the petition contained the same typewritten message and had room for 10 signatures. Silhavy wrote in Respondent's name before giving Bullman copies for distribution.

Bullman was present when employees: Rich Hawkins signed the petition on November 18; Roger Wolf signed on November 19; and Mike Cooper signed on November 20.[7] Bullman spoke to Jerry Poe about the petition and he left a copy of the petition in Poe's truck. Bullman found the petition in Bullman's toobox the next day at work with Poe's signature, dated November 19.[8] Bullman also collected signatures from Nathan Hatten, Rich Moit, Allen Feldscher, Richard Hamilton, and Herb Asher on the petition.[9] Bullman told employees the petition was to show the Machinists that the employees wanted the Union to represent them in collective bargaining, and to allow the Union to file a petition for an election with the NLRB.

General Counsel witness Douglas Dunagan worked for Respondent at the Indianapolis East facility until Dunagan's July 2001 discharge.[10] During November, Bullman and Dunagan discussed organizing a union and Bullman left two copies of the Machinists' petition for Dunagan in Bullman's vehicle, where Dunagan picked them up. A copy of employee Roger Wolf's signature was already on these copies of the petition. Dunagan distributed the petitions to Indianapolis East employees for signature. Dunagan read and signed the petition on November 21. Employees Will Clark, Steven Seabolt, and Shaun Cain read and signed the petition in Dunagan's presence on November 21. Dunagan witnessed employee Chris Barnett sign the petition. While Barnett's signature is dated November 21, Dunagan thought that he actually signed it on November 22.[11] Dunagan returned the signed petitions to Bullman.[12]

Dunagan testified that Cain initially refused to sign the petition, but then agreed to sign it when Dunagan approached him with more names on it. Dunagan testified that he told Cain "that it doesn't necessarily mean we're in the union, it just means that we're interested in the union." Dunagan went on to testify as follows:

> JUDGE FINE: Well, what did you tell them?
>
> THE WITNESS: I made most of them read it on their own and draw their own conclusions from it, but some of them that were going—that thought they were going to sign it meant that they were going to be in the union then and they weren't sure about it. I just told them that it didn't necessarily mean they were going to be in the union, it just meant that we were showing the union that we had enough support to go for an election.
>
> JUDGE FINE: And who did you tell that to?
>
> THE WITNESS: I don't recall.
>
> JUDGE FINE: Was it more than one?
>
> THE WITNESS: Probably, two or three, yes.
>
> JUDGE FINE: Okay. But you don't know which two or three?
>
> THE WITNESS: No.

However, Dunagan later testified on redirect examination as follows:

> Q. MR. JOHNSON: I believe you testified on cross that you told employees that signing this petition, General Counsel's 2, doesn't mean they're in the union.
>
> WITNESS: Yes.

[7] Bullman cut Wolf and Cooper's signature from the petition after they signed it to allow Bullman to scan the signatures and e-mail them to Silhavy. I credit Bullman's testimony that the petition was in tact with the Machinists' message, set for above, when these employees signed it and have counted their signatures in support of the Machinists' claim of majority status.

[8] Bullman did not witness Poe sign the petition. Respondent asserts that the General Counsel failed to properly authenticate Poe's signature. I disagree, and find, there is sufficient evidence to validate Poe's signature on the petition. The Board has held that a person other than the signer can authenticate an authorization card, and that a solicitor does not have to witness the employee sign the card as long as the card is returned to the solicitor by that employee. See *Douglas Foods Corp.*, 330 NLRB 821, 841 (2000), enf. denied on other grounds 251 F.3d 1056 (D.C. Cir. 2001). In *Overnite Transportation Co. (Dayton, Ohio Terminal)*, 334 NLRB 1074, 1092 (2001), it was stated that "[o]nce the General Counsel has proved by a preponderance that the cards were probably written by the employees whose names appeared on them, it was incumbent on Respondent to demonstrate that opinion was incorrect." Here, Bullman spoke to Poe about the petition, left a blank copy in Poe's truck, and a copy with Poe's signature was returned to Bullman's lunchbox the next day. I find that there is sufficient evidence as to the signature to shift the burden to Respondent to demonstrate that it is not valid and Respondent has failed to do so. I credit Bullman's testimony that he cut out Poe's signature to scan it to Silhavy and that the petition was in tact when it was signed by Poe.

[9] Respondent stipulated to the validity of: Moit's signature, dated November 18; and to Asher and Hamilton's signatures, dated November 20. Feldscher testified he read and signed the petition on November 19. Bullman testified Hatten signed the petition shortly before the Machinists filed a petition for election on December 11, and Respondent stipulated to the validity of Hatten's signature, although it only contains the number 12 next to the date. Respondent also stipulated to the validity of signatures from employees Jan Land and Ryan Blood, each dated November 20; and to Jacob Sebeschak's signature, dated November 21. The General Counsel asserts at p. 4, of his posthearing brief that employee Douglas Dunagan solicited Land, Blood, and Sebeschak's signatures, and noting that they are contained on same page of the petition that Dunagan forwarded to Bullman, I find that the General Counsel's assertion is correct. Dunagan testified that he solicited Sebeschak's signature.

[10] There is no claim here that Dunagan's discharge was violative of the Act.

[11] Dunagan witnessed employee Alan Cazares fill out the petition on November 22. Cazares printed and dated his name on the petition. However, Cazares did not sign the signature line of the petition. Counsel for the General Counsel stated at the hearing that they are not relying on Cazares to establish the Union's majority support.

[12] Bullman cut Barnett's signature off of one of the pages of the petition and moved it to another page where there were more signatures.

Q. BY MR. JOHNSON: And how many employees did you say that to? Two or three.

A. No. I'm wrong. I'm wrong about that. I probably told all of them that it doesn't necessarily mean you're in the union.

Q. Did you tell them anything else?

A. No. I let them read the paper theirselves.

Q. And, just so we're clear, did all the employees that you showed this to read the paper before they signed it?

A. Yes.

Silhavy filed a petition for election with Region 25 on December 11, in Case 25–RC–10008. As result an election was scheduled for January 19, 2001, but it never took place because the Machinists withdrew the petition for election on January 18. The parties agree that there were 32 employees eligible to vote in the following collective-bargaining unit, which constitutes an appropriate unit within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time mechanics and service personnel employed by the Respondent at its West and East facilities in Indianapolis, Indiana; BUT EXCLUDING all office clerical employees, all professional employees, all managerial employees, and a0ll guards and supervisors as defined in the Act.

Analysis

The General Counsel asserts that as of November 21, the Machinists established majority status with signatures of 19 employees in the agreed on 32-person unit, and that the Machinists picked up another signature by mid-December totaling 20 signatures in all. Respondent contends there are 11 signatures on the petition that are not authentic or were obtained through misrepresentation. In particular, Respondent contends that Dunagan misrepresented the purpose of the petition and that none of the signatures obtained by Dunagan should be counted for determining majority status. For reasons set forth below I agree with Respondent's contention that the Machinists did not obtain majority status.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 584 (1969), the Court stated, concerning union authorization cards, that a card which "states on its face that the signer authorizes the [u]nion to represent the employee for collective bargaining purposes . . . will be counted unless it is proved that the employee was told that the card was to be used solely for the purpose of obtaining an election." The Court went on to state that, "employees should be bound by the clear language of what they signed unless that language . . . (is) clearly canceled by a union adherent with words calculated to direct the signer to disregard . . . the language above his signature." Id. at 606. Statements to employees that authorization cards are desired to gain an election are not misrepresentations in that "such declarations normally constitute no more than truthful statements of a concurrent purpose for which the cards are sought." See *DTR Industries*, 311 NLRB 833, 839 (1993), enf. denied on other grounds 39 F.3d 106 (6th Cir. 1994). However, when cards are solicited on the "explicit or indirectly expressed representation" that they are to be used solely for the purposes of obtaining an election they cannot be used for a different purpose. See *NLRB v. Gissel Packing Co.*, supra at 608 fn. 27.[13] Similarly, the Board has held that unambiguous cards will be counted as valid unless employees are told "either explicitly or in substance that the cards would be used only or solely for an election." *DTR Industries*, supra at 842. Thus, the Board and the courts do not require certain magic words be uttered by the solicitor to find that employees were informed that cards or a petition are to be used only to obtain an election. Rather, the Board will look to the "substance" of what the solicitor informs employees.

The Machinists petition the employees signed here unambiguously states that, "this will authorize the International Association of Machinists and Aerospace Workers, AFL–CIO to represent me in collective bargaining with my employer." However, I have concluded that Dunagon's statements to employees negated the plain meaning of the petition. Dunagan testified that some of the employees, on reading the petition, felt that they were going to be in the Union then and they were not sure about signing the petition. In response, Dunagan told employees that signing the petition "didn't necessarily mean they were going to be in the union, it just meant that we were showing the union that we had enough support to go for an election." Based on admissions by Dunagan, I have concluded that he made these statements to every employee from whom he solicited a signature on the petition.[14] Thus, I have concluded that Dunagan informed the employees "in substance" that the petition was for an election only.

I have concluded that the General Counsel has established the following employees' signatures are valid in support of a bargaining order on behalf of the Machinists: Bullman, Luster, Hawkins, Wolf, Cooper, Poe, Moit, Feldscher, Hamilton, Asher, Dunagan, and Hatten.[15] Prior to the outset of Dunagan's testimony, Respondent stipulated that the signatures for employees Land, Blood, and Sebeschak, which were solicited by Dunagan, should be "counted in this proceeding in support of the Union in terms of the claim for card majority." Pursuant to that stipulation I have relied on those signatures as evidence of the Machinists' support for majority status.[16] I find that the

[13] See also *Burlington Industries v. NLRB*, 680 F.2d 974, 976 (4th Cir. 1982), where the court held the card solicitor "cancelled the printed language on the cards," when he told employees that "the cards was (sic) merely formal representations of a percentage of people, to bring in a union for an election purpose only." and "that it was just . . . to ask for an election."

[14] I have considered that on redirect examination, Dunagan testified that he only told employees that signing the petition "doesn't necessarily mean you're in the union" and that was all he told them. However, this was undercut by his prior testimony that he also told employees that signing the petition "just meant" they were showing the Union they had "enough support to go for an election." I find, considering Dunagan's demeanor and the way the questions were framed to him that he made both statements to all of the employees from whom he solicited signatures. I note, in reaching this conclusion, that there is no claim that Dunagan was given any instructions as to what he could tell employees while circulating the petition.

[15] Hatten's signature was obtained in mid-December, after the November 21, majority status date alleged in the consolidated complaint.

[16] Absent this stipulation, I would have not counted Land, Blood, and Sebeschak's signatures in support of the petition based on Dunagan's statements made during its circulation.

signatures that Dunagan obtained from employees Clark, Seabolt, Cain, and Barnett were obtained after Dunagan made statements to them misrepresenting the purpose of the petition. Thus, the Machinists, at most, had 15 valid signatures in support of a bargaining order which is not sufficient to establish majority status in the agreed on 32 person unit. Accordingly, paragraphs 7(b) and (c) of the consolidated complaint are dismissed.

B. Respondent's Response to the Machinists' Campaign

1. Woehlke requests employees to report harassment by union adherents

In November 2000, Woehlke was the STL in charge of daily operations at Indianapolis West. Woehlke testified that he learned of the Machinists campaign in November when employees told him that Bullman was soliciting signatures for the Union and that he phoned CSM Toneges and told him of Bullman's activity around Thanksgiving.[17] However, Woehlke, at one point when questioned by the General Counsel, denied talking to employees about the Union. After being shown his prehearing affidavit, Woehlke testified regarding the Union that, "employees approached me and felt that they were being harassed and I said if you feel you are being harassed then you need to put it in writing and then come see me." Woehlke initially testified that employees told him that they felt that the union representative was harassing them, but he later testified that they told him that Bullman was harassing them. Woehlke named Mike Dunn, Ron Murray, and Greg Scott as the employees who made the harassment claim.[18]

I find that Woehlke's instruction to employees that, if they felt that they were being harassed concerning the Union, to put it in writing and come see him is violative of Section 8(a)(1) of the Act. In *Nashville Plastic Products*, 313 NLRB 462 (1993), the Board held:

> Such a request could be interpreted by employees to include lawful attempts by union supporters to persuade employees to sign union cards. It would thus tend to restrain union proponents from attempting to persuade other employees for fear of being reported to management. See *Arcata Graphics*, 304 NLRB 541 (1991).

In finding Woehlke's conduct is violative of the Act, I have considered his testimony that he only issued his instruction in response to employee reports of harassment. However, Woehlke received only vague claims of harassment, and his response of telling employees to put it in writing and to come see him was likely passed on to other bargaining unit members. This is particularly so here, where there is a small unit and news of employees' union activity traveled fast in that it was quickly reported to management.[19] It can be presumed that, in such circumstances, news of Woehlke's directive was passed on to other bargaining unit members. In *Arcata Graphics*, 304 NLRB 541, the Board majority found a violation for conduct similar to that engaged in by Woehlke although Member Oviatt noted in dissent that *Arcata*'s solicitation was not unprovoked in that on its face it was in response to employee complaints. As in *Arcata Graphics*, Woehlke's solicitation for employees to report harassment by union adherents, even in response to employee generalized complaints of such conduct, would have the foreseeable consequence of restraining union proponents from attempting to persuade other employees to support the union. Woehlke's actions must also be considered in the context of the strong antiunion atmosphere created by Respondent's other unfair labor practices.

2. Respondent's top-level officials schedule and conduct numerous meetings with employees in a coordinated effort to defeat the Machinists

Senior manager of human resources, Buckley, then stationed in Cincinnati, was notified by an employee of the union campaign around the first week of December 2000. Buckley contacted Toneges and then Buckley attended, during the second week of December, four to six shift meetings covering all employees at the Indianapolis East and West locations during which he showed employees a video about signing a union card. Toneges called Buckley the following week and stated he had received the Machinists' December 11 NLRB petition for an election. Buckley faxed the petition to Bill Ihrig, Respondent's group director of labor relations in Miami, and Ihrig told Buckley that Ihrig would contact Director of Employee Labor Relations Herlihy about scheduling meetings in Indianapolis. Buckley spoke with Herlihy the same day. Buckley, Herlihy, and then vice president of operations for the East Central Region Cicchini met in Ohio and put together a typed schedule for Indianapolis meetings with employees.[20] The schedule is a two-page document, which reads as follows:

[17] I have credited this and other admissions by Woehlke, but I did not find him to be a very forthcoming witness. He at first denied that he heard employees state Bullman was soliciting cards, only to quickly change his testimony. He also initially denied attending any meetings with management about the Union, but then changed his testimony stating that he had a brief discussion with people from human resources including Buckley.

[18] Dunn and Murray did not testify at the hearing. Scott was called as a witness by Respondent but he did not testify about claims of harassment.

[19] For example, although Bullman had only started soliciting signatures on November 18, by Thanksgiving his activity had already been reported to Woehlke and Toneges.

[20] Buckley and Herlihy testified that they discussed the acronym "TIPS" that you cannot threaten, interrogate, make promises, or spy on employees with Cicchini and local management in Indianapolis early in the campaign, and that local management was told that they would be subject to discipline including discharge for violating the "TIPS" requirements. However, Woehlke and Cicchini failed to substantiate Buckley and Herlihy's claim that they were told about "TIPS," although Woehlke and Cicchini specifically testified about what Herlihy and Buckley told them they could say during conversations with employees. While Toneges testified that the "TIPS" requirements were discussed, Toneges failed to verify Buckley's assertion that managers were told they would be disciplined for engaging in such conduct. Having observed the witnesses' demeanor, I do not credit Herlihy, Buckley, and Toneges' testimony that the "TIPS" requirements were discussed with management during the union campaign. Rather, I find that "TIPS" was raised at the hearing to try to insulate Respondent from unfair labor practice findings.

Indianapolis Campaign Schedule Dec. 2000–Jan. 2001

12/13, 12/14, 12/15—Roger Cicchini, Rhae Buckley, and Bill Herlihy: Columbus, Ohio. Planning Schedule, Identify key participants, set forth action plan and key issues to be addressed. Analyze the two Indianapolis shops, what needs to be done and when. Rhae Buckley last week showed the first union campaign video—He held multiple meetings with both shops.

12/18—Monday—Roger Cicchini will visit the shops. He will talk to employees in a casual manner. He will introduce management Strategy—"Give the new GM (Mike Campanale) a chance."

12/19, 12/20, 12/2—Tuesday, Wednesday, and Thursday—Bill Herlihy and Rhae Buckley will conduct meetings with each individual—They will educate each employee (32) as to what happens in a campaign. They will follow up on management's theme "Give the new GM (Mike Campanale) a Chance." Vote "no" on Friday January 19th.

12/19, 12/20, 12/21, 12/22—Tuesday through Friday—Dave Toneges (CSM) will be working in both shops during this week.

Jack Hatten will visit the shops this week.

12/25—Shops Closed—Holiday

12/26—Tuesday—Rhae Buckley will visit both shops. Follow-up on individual meetings & get back with some employees in issues that were raised.

12/27, 12/28—Wednesday and Thursday—Jack Hatten will talk to the employees in both shops.

12/26 through 12/29—Tuesday through Friday—Dave Toneges will be in both shops.

1/1—Shop Closed—Holiday

1/2 through 1/5—Tuesday through Friday—Bill Herlihy will be in the shops.

1/2 through 1/4—Tuesday through Thursday—Jack Hatten will be in both shops.

1/2, 1/3, and 1/4—(Tuesday Night, Wednesday, and Thursday—Roger Cicchini will be in the shops to again talk to the employees.

1/3, 1/4, 1/5—(Wednesday, Thursday, and Friday)—Rhae Buckley will be in both shops.

1/3 and 1/4—Mike Campanale will be in both shops.

On Thursday 1/4 and Wednesday 1/3—We will conduct meeting for all employees and show video #2. (These meetings will be for small groups of employees—Approximately 4 meetings) At these meetings will be Roger Cicchini, Mike Campanale, Jack Hatten, Rhae Buckley, Bill Herlihy and Dave Toneges.

1/3, 1/4, 1/5—Weds Through Friday—Dave Toneges will be in both shops.

1/8–1/12—(Mon–Fri) Dave Toneges will be in both shops

1/9–/12—(Tues–Fri)—Rhae Buckley will be in both shops.

1/10–1/12—(Weds–Fri)—Jack Hatten will be in both shops.

1/10–1/11—(Weds–Thurs)——GM Mike Campanale will be in both shops.

1/10–1/11—(Weds–Thurs)—We will conduct meetings with the employees and show video #3.

1/15–1/19—(Mon–Fri)—Rhae Buckley will be at the two shops all week and meeting.

1/15–1/17—(Mon–Wed)—Jack Hatten will be at both shops, and final meeting.

1/17–1/19—(Mon–Wed)—Mike Campanale will be at both shops and final meeting.

1/17—(Wednesday)—Roger Cicchini will be at both shops and final meeting.

1/16–1/17—(Tues–Wed)—Bill Herlihy will be at both shops and final meeting.

1/15–1/19—(Mon–Fri)—Dave Toneges will be at both shops and meeting.

1/17—24–Hour Meeting—All Managers will be present and address all 32 employees.

Meeting/Luncheon (12–3pm). Will have other people cover both shifts for these hours. Will show Video #4.

1/19—Employees will vote on this date.

Will ask Kenny, Dave, etc., to cover weekends.[21]

3. Respondent's officials solicit grievances during company meetings

a. Legal principles

In *Clark Distribution Systems*, 336 NLRB 747, 748 (2001), the Board quoting from *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994), stated the following regarding solicitation of grievances:

> Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. . . . [I]t is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. . . . [T]he solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. . . . [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one[.]

In finding a violation in *Clark Distribution Systems*, supra, for soliciting grievances the Board noted that the respondent did not have a practice of its high-level officials individually soliciting grievances from employees on the warehouse floor and concluded that the conduct was not innocuous merely because the inquiries were general in nature and the union was not explicitly mentioned. The Board found that the employees understood that the officials were at the plant to speak with employees in response to the union organizing drive.[22] In

[21] Toneges testified that, to his recollection, the above schedule was followed during the campaign except that a video was not shown at the January 17, 2001 meeting.

[22] See also *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999), where the solicitation of grievances during a union campaign, in the

Clark Distribution Systems, supra slip op. at 2, the company's president and vice president separately approached an employee during the week before an election. One asked the employee, "What is going on around here?" In response, the employee stated that he was concerned with workrules. The employee was told that "we could work together for the rules to be suitable for everyone." The other asked the employee, "What is going on around here?" The employee complained about the workrules, wages, and unfair treatment. The Board found that the respondent's conversations with the employee constituted the solicitation of grievances in violation of Section 8(a)(1) of the Act and that "the Respondent has failed to rebut the inference that it was implicitly promising to remedy such grievances. To the contrary. Marcy told Lee that 'we could work together' to address his concern."

b. Cicchini's mid-December meetings with employees

Feldscher worked for Respondent at the Indianapolis West location on the second shift until his February 11, 2001 discharge. Feldscher attended a one-on-one meeting with Cicchini on December 18.[23] Feldscher credibly testified as follows: Cicchini identified himself, stated the Machinists filed a petition and he wanted to speak to the work force because he did not want the employees to go union. Cicchini asked how Feldscher felt about the Company and what Feldscher felt the problems were. Feldscher said the evaluation system was unfair and used to prevent employees from receiving a raise. Feldscher complained about his February 2000 evaluation and his failure to receive a raise even though he was in charge of the tire program. Feldscher also complained about his treatment concerning his attendance and his wife's health. Cicchini took notes and said he thought Feldscher should have been compensated for taking over the tire program. Cicchini said he understood an employee has to take care of a sick wife. Cicchini said they were going to talk to employees and management's position was they could work this out and a union was not needed to fix the problems.

Bullman also attended a one-on-one meeting with Cicchini and his credited testimony reveals that: Cicchini told Bullman he knew there was a lot of commotion going on about the Union. Cicchini said he wanted to know how Bullman felt about the Company and what Bullman's issues were. Cicchini said Bullman needed to tell Cicchini if Bullman had any complaints that Cicchini could help him with. Bullman told Cicchini the pay system allowed for favoritism over appraisals and an employee had to do extra work to receive advancement pay. Cicchini said he understood the employees' concerns and things would work out for the better.[24]

Analysis

Cicchini told Feldscher in their meeting that he did not want the Company to go union and he asked Feldscher how he felt about the Company and what he felt the problems were. Feldscher complained about evaluations, his failure to receive a raise, and his treatment concerning his attendance and his wife's health. Cicchini said he thought Feldscher should have been compensated for running the tire program, that if an employee had a sick wife she had to be taken care of, and that management's position was that they could work this out and they did not need a union. Similarly, he told Bullman that he knew there was a commotion about the Union, and that Bullman needed to tell Cicchini about any complaints Cicchini could help him with. Bullman complained about the pay system, and Cicchini said he understood his concerns and things would work out for the better. In conducting these meetings, Cicchini acted in contravention of Respondent's established practice for resolving grievances as set forth in its corporate guidelines.[25] I find that, during his meetings with Feldscher and Bullman, Cicchini solicited and promised to remedy grievances and complaints as a quid pro quo for employees rejecting the Union in violation of Section 8(a)(1) of the Act.

As part of Respondent's campaign strategy, Cicchini, a high-level official, met with all the bargaining unit employees in one-on-one meetings. Cicchini testified all the meetings were similar in that he was directed to and asked employees about their issues and said he was there to listen to their problems. I find that by engaging in this conduct, in the midst of a union campaign and in contravention of established procedures for handling grievances, Cicchini solicited and implied that Respondent would remedy employee grievances in violation of Section 8(a)(1) of the Act. See *Clark Distribution Systems*, supra, and *Naomi Knitting Plant*, supra.[26] With the convergence of high-level officials at the Indianapolis facilities, the multiple meetings, the antiunion videos, the repeated stated opposition to the Union in combination with Respondent's

absence of a past practice of such conduct, was found to raise the inference of an implied promise to remedy the grievances.

[23] The December 18 date was gleaned from Respondent's typed schedule.

[24] Cicchini testified Herlihy and Buckley told him to try and find out what the issues were, but he should not make any promises. Cicchini met with and had similar discussions with all of Respondent's Indianapolis East and West employees in one-on-one meetings. Cicchini testified he asked the employees about their issues and told them he was there to listen to their problems. I do not credit Cicchini's claim that he did not tell or imply to employees that he would remedy their problems. In this regard, Feldscher and Bullman testified in a credible fashion and their recollection of their meetings was much clearer than that of Cicchini's.

[25] Respondent's "Corporate Conduct Guidelines" provide for an "Open Door Process" where employees have the "opportunity to . . . be heard on matters that you consider important." The policy states, "When you have a question, a suggestion, or a complaint, you should ordinarily first approach your immediate supervisor." If the matter is not resolved the employee is directed to their supervisor's supervisor, and then to continue "through the management chain of command in your department or at your location." If the matter is still not resolved, only then is the employee directed "to go directly to anyone in division management or Human Resources." Here, Cicchini worked backwards by initiating the inquiry and by bypassing multiple layers of management in the process.

[26] *National Micronetics*, 277 NLRB 993 (1985), cited by Respondent, where generalized statements such as asking employees to give the company a second chance were found to be lawful is distinguishable. Cicchini did not just make generalized remarks. Rather, he responded to specific complaints that he solicited from employees, and in the case of Feldscher and Bullman he said they did not need a union, and things would work out for the better.

other unfair labor practices, it could not be lost on the employees that Cicchini's promises were conditioned on their rejecting the Union.

c. Herlihy and Buckley's mid-December meetings with employees

Respondent's schedule shows that Herlihy and Buckley conducted individual meetings with each unit employee during December 19 to 21. Feldscher attended one of the meetings and his credited testimony reveals that: Herlihy and Buckley introduced themselves and Herlihy had a folder with Feldscher's name and some notes on it. Herlihy had a copy of Respondent's new vacation proposal and he said, under the policy, Respondent reduced from 7 to 5 years the time required for an employee to acquire 3 weeks vacation, and with the new policy's transition time Feldscher would have between 25 or 27 vacation days in 2001.[27] Herlihy asked Feldscher's concerns with the company and Feldscher said he had been disciplined too severely over an attendance incident concerning his wife and he did not think the employee evaluation system was fair. Feldscher said he thought they needed a third party referencing the Union because it was too easy for management to prevent employees from getting a raise. Buckley inquired about Feldscher's wife. Feldscher said he took his wife to the doctor and the emergency room, then reported to work 7 minutes late and received a 3-day suspension. Buckley said that he understood the concern and he could not dwell on the issue other than to state management was not that hard nosed. Buckley said there were some changes being made, and that instead of a year people were going to be evaluated every 6 months.[28]

I find Herlihy and Buckley violated Section 8(a)(1) of the Act, during their meeting with Feldscher, by soliciting grievances and implicitly promising they would be remedied if the employees rejected the Union. Herlihy and Buckley are both high level officials whose only purpose for being at Respondent's Indianapolis facilities was to convince employees to reject the Union. One of the stated goals set forth in Respondent's typed schedule in conducting these meetings was to "identify key participants, set forth action plan, and key issues to be addressed."[29] It was readily apparent to Feldscher that Herlihy and Buckley met with him in direct response to the Union's organizing drive. I find that they violated the Act when Herlihy asked Feldscher about his concerns with the company. Then Feldscher, in response, voiced complaints about past discipline and the evaluation system, and Buckley responded that he understood, that management was not that hard nosed, that some changes were being made, and people were going to be evaluated every 6 months instead of just once a year. Buckley specifically addressed Feldscher's concerns raised as a result of Herlihy's questioning. See *Clark Distribution Systems*, supra, and *Naomi Knitting Plant*, supra.

4. Respondent's new vacation policy

Toneges testified as follows: On December 28 or 29, Toneges received an e-mail with a memo entitled, "Manager Communications Kit" attached informing him of the contents of Respondent's new nationwide vacation policy, which was effective on January 1, 2001. The policy changed the way vacation was calculated from using an employee's employment anniversary date to January 1 each year for all employees. The policy included a one time bonus where employees could retain days they had accumulated under the old policy called transition days when the new policy reset on January 1. The "Manager Communications Kit" contained the following eligibility requirement for the new vacation policy:

> All full-time and part-time employees in the U.S. are eligible, except for those employees operating under a collective bargaining agreement.

Toneges testified some employees could almost double their vacation under the new vacation policy for the initial year in 2001.[30] The new policy also decreased from 7 to 5 years the time required for an employee to earn a third week of vacation, decreased the time required to earn a fourth week of vacation, and for the first time allowed new hires to accrue vacation time during their initial year of employment.

a. Herlihy threatens employees with loss of vacation and other benefits during January 3 and 4 shift meetings

Toneges' testimony revealed that: Herlihy presented Respondent's new vacation policy to the employees at the Indianapolis East and West facilities during six shift meetings on January 3 and 4, 2001, also attended by management officials Buckley, Toneges, and Jack Hatten, the field maintenance manager for the east central region. All of the meetings were virtually the same in the manner Herlihy announced the vacation program. The meetings began with the employees being shown a video about the Union. Then Herlihy brought up the vacation policy. The employees were told that the new vacation program took effect January 1, 2001, and that for the year 2001 they would have the vacation they earned during 2000, plus vacation hours they were going to receive in 2001, plus transition days. The employees were allowed to review certain pages of the "Manager Communications Kit" to determine how many vacation days they were to receive in 2001 under the new policy.[31] Buckley testified that, during each of these meetings, Herlihy read or had one of the employees read the statement that employees operating under a collective-bargaining agreement were not eligible to participate in the new vacation pol-

[27] Feldscher testified that before the new policy he was entitled to 2 weeks vacation.

[28] I have credited Feldscher's testimony as set forth above. I have considered but not credited Buckley, Toneges, and Woehlke's claims that they thought Feldscher was opposed to the Union for reasons set forth in detail later in this decision.

[29] Herlihy and Buckley by soliciting grievances acted in contravention of Respondent's published "Open Door Policy" which instructed employees to first address complaints with their immediate supervisor.

[30] The new vacation policy also applied to management. Toneges calculated that he would receive 8 weeks of vacation, plus 7 transition days in 2001 under the new policy, but that he would have had just 4 weeks of vacation as of January 1, 2001, under the old policy.

[31] All of the employees also received personal copies of the vacation policy calculation pages either at these meetings or during the first week in January.

icy.[32] Herlihy testified that, during these meetings, he also reviewed and countered statements contained in two prounion e-mails that had been given to him by employees. The employees told Herlihy that Bullman was the author of the two e-mails.

Bullman attended the January 3 or 4, 2001 meeting held for the third shift at the West facility and his credited testimony reveals that: Herlihy announced the new vacation policy, gave its effective date, and discussed the improved benefits contained in the new policy. Herlihy said that the only way the employees would receive the new vacation policy was if they voted against the Union and did not have a collective-bargaining agreement. Herlihy said that "we start, once you elect a Union you have nothing, you have no benefits this is what you got, nothing. And he held up a blank sheet of paper." Herlihy told an employee how many vacation days he would have under the new policy if there were no collective-bargaining agreement. Buckley showed a video where it was stated that unions were the cause of deregulation, which caused trucking companies to go out of business. Following the video, Bullman raised his hand and said deregulation came from the government and companies under bidding each other was the cause of their going out of business not the unions. Bullman also said the video showed that at union meetings employees were threatened, yelled at and told to shut up when they asked questions. Bullman said employees were not treated that way at the union meetings he attended. Buckley gave the floor to Campanale who said he could not promise anything during the election, but he heard their concerns, to give him a chance because he is new, to vote no for the Union and that he would make everything right after the vote.[33] Then Herlihy said Respondent was going to do a wage survey to show employees how they were paid. Bullman said Respondent had a recent wage survey, which was not limited to leasing companies. Bullman asked why they could not use the companies used in the prior survey and stated it appeared Respondent only wanted to use companies that benefited the Company not the employees. Herlihy said they would use the companies "[as] we see fit." At the end of the meeting, Herlihy held up a sheet of paper and said remember "this is what you get, blank." Herlihy said that if the employees vote for the Union they would not have the extra vacation days under the new vacation policy.

Feldscher's credited testimony reveals that he attended a mandatory employee shift meeting in early January 2001. During the meeting, Herlihy brought up the new vacation schedule and he read its description. Herlihy told employees that this would be their vacation schedule unless they became a collective-bargaining shop. Herlihy said if the employees became a collective-bargaining shop "you will start with this, a blank sheet of paper." Herlihy held up blank sheet of paper and said the employees will start with this and then barter with the company. Herlihy said that the Union and the Company will barter over what you get but you will not get the new vacation policy if you become a collective-bargaining shop.

1. The testimony of Respondent's witnesses

The testimony of Respondent's witnesses about Herlihy's blank sheet of paper remark vacillated at the hearing, and was undercut by admissions contained in prehearing affidavits. Toneges testified that, during the shift meeting with Bullman, Herlihy had an employee read the language that the new vacation policy did not apply to employees operating under a collective-bargaining agreement and an employee asked if the employees lost the program if they voted a union in. Toneges testified Herlihy answered that the vacation policy was for non-bargaining unit employees as of January 1 and, if they chose to be union, when the Union and Respondent sat down to bargain "that could be something that they could agree upon." However, Toneges admitted that he had previously testified in his affidavit of May 22, 2001, that the question was raised that "if we voted the union in, does that mean we lose the vacation program and Bill Herhue's (Herlihy's) response was, if the union was voted in, then you start off at ground zero, like a blank sheet of paper." Toneges attempted to disavow the affidavit at the hearing by testifying that Herlihy never used the term "ground zero," and stating that, "ground zero was my words." I did not find Toneges attempt to distance himself from the affidavit to be persuasive because Toneges also testified that when he gave the affidavit concerning the term ground zero, "I thought that I recalled him saying that." Toneges testified during the hearing that Herlihy used the term blank sheet of paper and claimed that Herlihy said that if "the company and the union sat down at the table . . . they start with a blank sheet of paper and they could either get more, less, or the same." The latter contention was undercut by the following Toneges' admission on cross-examination:

> Q. Now in each of these meetings didn't Mr. Herlihy tell the employees that this policy didn't apply to employees who were represented by a Union?
>
> A. I can't recall if he said that in all six meetings that is why I testified that I heard at least twice but not, you know, I can't give a guarantee that he said that in all six.

Herlihy denied stating that employees' vacation benefits were contingent on whether they voted for the Union. He testified that, during the meeting for Bullman's shift, Herlihy said that if a union is elected "there was no guarantee that you will keep what you have, you could get more, you could stay the

[32] Toneges testified that, although he usually would inform employees of the new vacation policy, he asked Buckley to introduce it to the Indianapolis East and West employees because Toneges thought his interpretation of the policy was too generous. I do not credit Toneges' explanation for his failure to follow normal procedures because Toneges did not seek Buckley's assistance in explaining the policy to Terre Haute employees, who were also under Toneges' jurisdiction but were not involved in an active union campaign. I find that Herlihy and Buckley chose to introduce the vacation policy at the Indianapolis East and West facilities as part of Respondent's strategy to persuade employees not to support the Union. In this regard, they announced the policy during meetings previously scheduled for Respondent's anti-union campaign and incorporated the announcement as part of Respondent's campaign propaganda.

[33] This statement by Campanale was not alleged to violate the Act in the complaint, and although I find that the statement was made, its import was not fully litigated as to whether it is violative of Sec. 8(a)(1) of the Act.

same, or you could get less." He testified that Bullman took issue with this statement. Herlihy denied using the term ground zero when talking about vacation benefits. He also testified that he did not recall holding up a blank sheet of paper during the meetings, but stated that he could have. However, Herlihy admitted stating in his affidavit of August 17, 2001, that he said that employees should think of negotiations as a blank sheet of paper because there were no guarantees. Buckley testified that the video shown at the six early January shift meetings said that when you negotiate things could go up, go down, or remain the same, and that everything was negotiable. Buckley testified that the new vacation policy was discussed at the meetings and Herlihy read or had an employee read the statement that: "All full time and part time employees of the US are eligible except those employees operating under a collective bargaining agreement." Yet, Buckley denied Herlihy said employees would lose the increased vacation benefits if they voted for the Union. Noticeably absent from Buckley's testimony was any discussion of Herlihy's blank sheet of paper remark.

2. Analysis

In *Voca Corp.*, 329 NLRB 591 (1999), the Board found the respondent violated Section 8(a)(1) of the Act by issuing a corporate wide bonus program that automatically excluded union represented employees and stated:

> In 1993 and 1994, the VIP Program stated that employees were eligible for the bonus program if . . . . You are not a member of a collective bargaining unit. We agree with the judge, for the reasons stated by her, that the Respondent violated Section 8(a)(1) of the Act by "the suggestion inherent in the exclusionary language that unrepresented employees will forfeit the plans' benefits if they choose union representation." *Handleman Co.*, 283 NLRB 451, 452 (1987). See also *Lynn-Edwards Corp.*, 290 NLRB 202, 205 (1988) ("It is well settled that an employer violates Section 8(a)(1) through a provision in, or a statement about, a plan that suggests that coverage of employees will automatically be withdrawn as soon as they become represented by a union or that continued coverage under the plan will not be subject to bargaining.").

In *Niagara Wires, Inc.*, 240 NLRB 1326 (1979), the Board found language in a pension plan excluding from coverage employees "subject to the terms of a collective-bargaining agreement" to be violative of Section 8(a)(1) of the Act. The Board stated at 1327:

> Here, Respondent's plan, in limiting eligibility to employees who are not covered by a collective-bargaining agreement, in effect, conditions eligibility on the unrepresented status of the employees. It is clear that Respondent publicized this restriction by distributing summaries of the plan to its employees a few weeks before they were scheduled to vote in the union election. While there is no reason to assume that the distribution of the plan was unlawfully motivated, the communication and the continued existence of such an exclusionary eligibility requirement necessarily exert a coercive impact on the employees. It is for this reason that an employee benefit plan which restricts coverage to unrepresented employees is *per se* violative of Section 8(a)(1) of the Act, regardless of whether the employer adds to the misconduct by implementing the restriction or exploiting it during an organizing campaign.

In the instant case, Respondent's corporate headquarters issued a document entitled "Manager Communications Kit" which set forth a new corporatewide vacation policy with an effective date of January 1, 2001. The new vacation policy contained an exclusionary provision virtually identical to the one the Board found to be per se unlawful in *Niagara Wires, Inc.*, supra. Respondent's vacation policy eligibility requirement reads as follows:

> All full-time and part-time employees in the U.S. are eligible, except for those employees operating under a collective bargaining agreement."

However, during the hearing, I asked counsel for the General Counsel if the maintenance of this exclusionary language in the new vacation plan was being alleged as violative of the Act and the following exchange occurred:

> JUDGE FINE: I want to be sure, there is testimony that they read and that these policies did not apply to people in collective bargaining units, right?
>
> MS. MAGES: Correct, there has been testimony to that effect, yes.
>
> . . . .
>
> JUDGE FINE: My question is they read that statement to employees, are you saying the reading of that statement is a violation of the Act?
>
> MS. MAGES: Yes Your Honor.
>
> JUDGE FINE: But you are not saying the fact that the statement is in the policy violates the Act?
>
> MS. MAGES: Correct.

The allegations in the consolidated complaint concerning remarks by Herlihy about the new vacation policy are set forth in paragraphs 5(d), (e), and (f) and are limited to statements alleged to have been made by Herlihy at the Indianapolis West facility. However, based on Buckley's testimony, I conclude that Herlihy either read the above quoted exclusionary provision or had it read to all of the unit employees during the course of six shift meetings held for both Indianapolis East and West employees on January 3 and 4, 2001. I find that, by reading this statement to employees which excluded coverage of the new vacation policy for employees operating under a collective-bargaining agreement shortly before the scheduled election that Herlihy threatened employees with loss of vacation benefits if they selected the Machinists as their collective-bargaining representative and that conduct was violative of Section 8(a)(1) of the Act. See *Voca Corp.*, supra, and *Niagara Wires, Inc.*, supra. The coercive effect of Herlihy's actions is evident through Toneges and Bullman's testimony, which reveals that Herlihy went into great detail about the benefits in the new vacation policy which would have greatly expanded employees' vacation time particularly for the year 2001. Additionally, the employees were told at the January 3 and 4 meetings that the vacation policy had an effective date of January 1, 2001, thus, the policy was technically already in effect for them at the time of the shift meetings. Yet, the Machinists' election was not scheduled until January 19, 2001. Thus, statements that the

policy did not apply for employees operating under a collective-bargaining agreement were particularly coercive in that they implied that the employees would lose benefits that had already been conferred if they selected the Union during the election.

I have also credited Bullman and Feldscher's testimony that Herlihy went beyond the mere reading of the exclusionary vacation policy language during the meetings. Bullman testified that Herlihy said the only way the employees would receive the new vacation policy was if they voted against the Union and did not have a collective-bargaining agreement. Feldscher testified Herlihy said that the Union and the Company will barter over what you get but you will not get the new vacation policy if you become a collective-bargaining shop. I find that both of these statements threatened employees with loss of vacation benefits if they selected the Machinists and violate Section 8(a)(1) of the Act, separate and apart from repeated reading of the exclusionary language contained in the new vacation policy.

Toneges testified that a page from the "Manager Communications Kit" was also posted at the East and West facilities during the first week in January which announced several aspects of the new vacation policy and stated, in pertinent part, that "This policy supersedes all existing policies, procedures, memoranda or practices currently in effect, except for those employees operating under a collective bargaining agreement." For the reasons set forth above, I find this posting so close to the scheduled election to be violative of Section 8(a)(1) of the Act. While this conduct was not alleged in the complaint, I find that it has been fully litigated.[34]

[34] While the January 1, 2001 vacation policy was amended by Respondent via nationwide e-mail dated February 12, 2001, the policy continues to exclude employees operating under a collective-bargaining agreement from participation. The cited case law suggests that the Respondent's maintenance of this provision in its vacation policy may warrant an independent finding that Respondent is violating Sec. 8(a)(1) of the Act. See *Voca Corp.*, supra, and *Niagara Wires, Inc.*, supra. However, the consolidated complaint contains no allegation that the maintenance of this language in the vacation policy is violative of the Act, and counsel for the General Counsel stated at the hearing that the General Counsel was not raising this contention, although she informed Respondent that the reading of the exclusionary language to employees during a preelection setting was being alleged to be violative of the Act. While the Board has, in the past, found the exclusionary language contained in Respondent's plan to be a per se violation of the Act, there has been at least one occasion where in the circumstances peculiar to that case the Board did not find a violation. See *A. H. Belo Corp.*, 285 NLRB 807 (1987). Given the fact that there has been an exception to the rule, and noting counsel for the General Counsel's disclaimer at the hearing, I have concluded that the maintenance of the exclusionary language in Respondent's vacation policy has not been fully litigated here and therefore there is insufficient basis to make an affirmative finding of unlawful conduct by Respondent's maintenance of this provision. I do note, however, that even if the *A. H. Belo* decision, the Board stated at 809, "if it had been alleged that the Respondent had used its announcement of the sick-pay plan as a device to defeat the Union by implicitly promising benefits to be accorded if the unit employees voted to decertify the Union, we would have a different case."

The consolidated complaint alleges Respondent violated the Act when Herlihy at Respondent's West facility "informed employees that negotiations would start from zero if they selected the Machinists as their collective-bargaining representative." Bullman's testimony establishes that during the early January meeting Bullman attended, after telling employees the only way they would receive the new vacation policy was if they voted against the Union and did not have a collective-bargaining agreement, Herlihy said once you elect a union you have no benefits, you have nothing, and he held up a blank sheet of paper. Herlihy then went on to other topics, but at the end of the meeting he reiterated that if they voted for the Union they would not have the extra vacation days, and he again held up the blank sheet of paper stating this is what you get blank. Feldscher's testimony reveals that, during the meeting he attended, Herlihy said if the employees became a collective bargaining shop they would not receive the new vacation schedule, and that they will start with a blank sheet of paper and then barter with the company. I have also credited the testimony contained in Toneges' May 22, 2001 affidavit, where he stated that the question was raised that "if we voted the union in, does that mean we lose the vacation program and Bill Herhue's (Herlihy's) response was, if the union was voted in, then you start of at ground zero, like a blank sheet of paper."[35]

I find that by informing employees that if they voted the Union in that negotiations would start at a blank sheet of paper and at ground zero Herlihy threatened employees with a loss of existing benefits in violation of Section 8(a)(1) of the Act. See *Plastronics, Inc.*, 233 NLRB 155, 156 (1977).[36] This is particularly so here, where Herlihy's statements concerning the blank sheet of paper and starting from ground zero were directly tied to his threats of loss of vacation benefits. See *Guardian Automotive Trim, Inc.*, 337 NLRB 412, 419 (2002), holding that the respondent's statements that the union would start at zero violate the Act inasmuch as they were made in conjunction with

[35] In crediting this admission in Toneges' affidavit, I have considered Respondent's contention that no other witness verified the ground zero remark. However, in view of the large number of meetings conducted by Respondent, I do not consider other witnesses failure or refusal to recall the remark as requiring a finding that it was not made. Moreover, the import of Bullman and Feldscher's testimony at the hearing was similar to that contained in Toneges affidavit, although it was expressed in slightly different terminology, that is if employees select the Union they would start negotiations as if they had no benefits, like a blank sheet of paper, or to coin the phrase Toneges' affidavit imputes to Herlihy at "ground zero."

[36] While I have no doubt, as Buckley testified, that the video shown by Respondent during these meetings did reference a give and take during negotiations and the possibility that benefits could increase, decrease, or remain the same, I do not credit the testimony of Respondent's witnesses that Herlihy, separate and apart from the video, detailed to employees that in negotiations benefits could increase, decrease, or stay the same. Rather, on observing the witnesses' demeanor, and considering the deviation of the testimony of Herlihy and Toneges at the hearing from their prehearing affidavits, I have concluded that it was Herlihy's intent to inform employees that negotiations would start from ground zero, and a blank sheet of paper, and the Union would have to barter up just to obtain the benefits the employees already had.

other 8(a)(1) statements demonstrating their bad faith. See also *Noah's Bay Area Bagels, LLC,* 331 NLRB 188 (2000); and *Tufts Bros. Inc.*, 235 NLRB 808 (1978).[37]

b. Woehlke threatens employees with loss of vacation benefits if they select the Union

Some time in January 2001, while he was applying for his vacation, Bullman had a conversation with Woehlke about vacation days. During the conversation, Woehlke told Bullman he had some extra vacation time but he would only receive it if he voted against the Union.[38] Woehlke testified that before the January 19, 2001 scheduled election, he held meetings for the first and third shifts at the Indianapolis West facility where he informed employees that collective-bargaining units were not covered by Respondent's new vacation package. Woehlke read to the employees the statement contained in Respondent's new vacation policy that "[a]ll full time and part time employees in the US are eligible except for those employees operating under a collective bargaining agreement." I find that by informing Bullman that he would lose extra vacation time by voting for the Union, and by reading the exclusionary language in the vacation policy to employees shortly before the scheduled election that Woehlke threatened employees with loss of vacation benefits if they selected the Machinists as their collective-bargaining representative in violation of Section 8(a)(1) of the Act. See *Voca Corp.*, supra, and *Niagara Wires, Inc.*, supra.[39]

c. Respondent's January 5, 2001 e-mail to management stating there was an error in the new vacation plan

On January 5, 2001, Respondent, issued an e-mail from its Miami headquarters addressed to "All US Officers and Directors," marked "URGENT NOTICE REGARDING NEW EMPLOYEE VACATION PROGRAM." The e-mail states the vacation policy is under review. Herlihy and Buckley are listed on the e-mail distribution list. The e-mail states, "Blame it on the holiday rush or too much eggnog, but we made a serious error in the recently communicated Ryder Employee Vacation Program. The one-time transition component of the vacation program is being modified." It states while they were assessing the impact of the error on the Company, "we are asking all U.S. Officers and Directors to immediately halt any activity relating to this information, including scheduling vacation time for 2001, and to instruct their managers to do the same until we have had the opportunity to provide further instruction." The memo states that, "[w]e will communicate to you again on this issue early next week." A copy of this e-mail was forwarded to Toneges sometime during the week of its issuance. However, Toneges testified that there was no posting at the Indianapolis East and West facilities notifying employees that the vacation policy was under review and Toneges did not discuss the "eggnog" memo with employees. He testified that no meetings were held at the East or West facility to tell employees that the policy was under review.[40]

5. Respondent's January 17 meeting

Respondent held a mandatory meeting for all Indianapolis East and West unit employees on January 17, 2001, at a Marriott hotel with the following managers present: Herlihy, Buckley, Cicchini, Campanale, Toneges, Woehlke, and Jay Tietz. The employees were paid for their attendance and received a free lunch. Buckley testified he started the meeting and told the employees that they could vote yes or no, but Respondent believed it did not need a third party to represent the employees. Buckley then introduced Herlihy, who Buckley testified said basically the same thing. Cicchini also testified that, during the meeting, he told employees that he did not think they needed a third party to represent them.[41]

Bullman's credited testimony reveals the following about the January 17 meeting: Herlihy announced the date of the election, and said every one needs to vote whether they were going to vote yes or no. Herlihy said that if an employee signed a union card they could still vote against the Union. Herlihy said the employees should trust the Company and give the Company

[37] *BI-LO*, 303 NLRB 749, 750 (1991), enfd. 985 F.2d 123 (4th Cir. 1992), cited by Respondent does not require a different result. There the Board held that in the context of the company president's other remarks his statements that during an initial contract that the parties would be bargaining basically from nothing "did not reasonably tend to indicate that the Respondent intended to strip away benefits prior to bargaining and force the Union to negotiate restoration of those benefits." However, I agree with Respondent's contention that the General Counsel introduced no evidence in support of par. 5(f) of the consolidated complaint relating to remarks attributed to Herlihy on January 11, 2001. I also find that no evidence was introduced in support of 5(j) of the complaint. Accordingly, pars. 5(f) and (j) of the consolidated complaint are dismissed.

[38] I have credited Bullman's description of this conversation over Woehlke's general denial that he had any one on one conversations with employees about the vacation policy.

[39] Woehlke's reading the exclusionary vacation language to unit employees was not specifically alleged as violative of the Act in the consolidated complaint. However, I find this conduct was fully litigated and is closely related to the subject matter of the complaint. See *Gallup Inc.*, 334 NLRB 366 (2001); *Marshall Durbin Poultry Co.*, 310 NLRB 68 fn. 1 (1993), enfd. in relevant part 39 F.3d 1312 (5th Cir. 1994); and *Monroe Auto Equipment Co.*, 230 NLRB 742, 751 (1977), where violations were found for matters not specifically alleged in the complaint but that were fully litigated.

[40] In light of the preceding testimony, I do not credit Toneges' claim that there were hourly employees at the West facility, who became aware of the January 5 e-mail. Buckley's testimony changed during the course of the hearing about whether the January 5 memo caused him to alert unit employees that there was going to be a change in the vacation policy. Buckley initially testified that, after the January 3 and 4 meetings, he did not return to Indianapolis until a couple of days before the scheduled January 19 election date. On review of the January 5 e-mail, Buckley testified that he would usually rely on GMs to communicate the matter to employees. However, he then testified that he may have discussed the e-mail with some of the Indianapolis East and West employees and told them that the transition portion of the program was under review. He later testified that he spoke to at least 10 bargaining unit employees about the January 5 e-mail. Considering his demeanor and the shifting content of his testimony, I do not credit Buckley's claim that he informed unit employees about the January 5 e-mail.

[41] Despite the forgoing testimony that employees were repeatedly told management did not think that employees needed a third party to represent them, Toneges refused to acknowledge that these statements were made. When asked if any from the company said that the company was not in favor of the Union, Toneges replied, "I don't recall that. Not in that meeting."

a chance. Bullman asked how Herlihy could ask the employees to trust management when Herlihy had previously told Bullman employees were paid based on job performance and not seniority, but Bullman overheard him tell another employee the same night that the reason some employees received more money was based on seniority. Herlihy responded that Bullman was a "God Damned liar" and that Bullman was "F'ing lying." Herlihy went on to state he knew that Bullman went on a union blitz on his day off. Herlihy said that, "I am a liar just like you are a liar because you called in sick one night and then you also went on that Union blitz yesterday on your day off."[42]

Bullman testified that at the end of the meeting, Herlihy said management was going to leave the employees by themselves and let them talk for a while, than management walked out the door. When management left, employees took turns speaking. Bullman testified that when the doors opened to end the meeting, the management officials were in the hallway on the other side of the doors to the conference room.[43] Feldscher testified that, at the end of the meeting, Buckley said that management was going to leave the room and give the employees a chance to talk among themselves, that there was no time limit on how long they wanted to stay and hash this out. When Feldscher left the room, Buckley, Herlihy, and possibly Toneges were standing in the hall about 10 or 15 feet from the door to the meeting room. Dunagan testified, at the end of the meeting, Buckley said he was going to pass the floor for employees to talk and that management would walk outside. Buckley said employees could discuss the election and their plans as to which way they were going to vote. He said he had heard some older technicians had some things to say and he was going to give them the floor.

The testimony of Respondent's witnesses about Herlihy's remarks during this meeting was inconsistent between witnesses, and contradicted by statements made in prehearing affidavits. Considering the witnesses' demeanor, I have credited Bullman's testimony as corroborated by Feldscher and Dunagan as set forth above. My credibility resolutions are supported by the following discussion of the testimony of Respondent's witnesses.

Toneges testified that, during the meeting, Herlihy and Bullman got into a disagreement, which resulted in Bullman calling Herlihy a liar. Herlihy responded that he supposed Bullman was not lying when he called in sick on Friday night and was supposed to be working, and that Bullman had made a miraculous recovery. He testified that Herlihy told Bullman, "[Y]ou're the god-damn liar." Toneges claimed that he did not recall Herlihy stating, during the meeting, that Bullman had gone out for the Union when he called in sick. However, Toneges testified that he knew that was what Herlihy was referring to when he called Bullman a liar because an employee had told Toneges that Bullman had gone out for the Union and he believed that Herlihy had been provided the same information. Yet, Toneges admitted, on cross-examination, that he stated in his May 22, 2001 affidavit that when Herlihy called Bullman a "God-damned liar" that Herlihy said you are the one that called in sick on Friday night and then went out on Saturday morning knocking on doors with the union representatives. Toneges went on to testify as follows at the hearing:

> Q. And Mr. Herlihy then went on and said to Mr. Bullman—said to Mr. Bullman in the presence of everybody that you are the one that called in sick on Friday night and then went out on Saturday morning knocking on doors with the union representatives?
>
> A. Yes. I believe there was some conversation about that.

Herlihy testified as follows about his conversation with Bullman during the meeting:

> Q. Do you recall a confrontation you had with Tim Bullman at that meeting?
>
> A. I didn't know it was a confrontation, but I remember him asking a question and—
>
> . . . .
>
> Q. What did he ask you?
>
> A. Again, it was the second time that he said, this time in front of the entire group, you continue to—you continue to tell all these untruths to the employees.
>
> . . . .
>
> A. I shot right back. I said, if there's anybody lying to the group, it's you.
>
> Q. Do you recall saying anything about him being sick or seeking—doing house calls? Do you recall making those statements?
>
> A. No, I don't.
>
> Q. Okay.
>
> JUDGE FINE: Are you denying you made the statements?
>
> THE WITNESS: I don't recall them.
>
> JUDGE FINE: Did you make any statements about his union activity?
>
> THE WITNESS: About his what?
>
> JUDGE FINE: Union activity.
>
> THE WITNESS: I have no idea what he did. No, I didn't make any comments about that.

[42] General Counsel witnesses' Dunagan and Feldscher corroborated Bullman's testimony about Herlihy's remarks at the meeting. Dunagan testified that during the meeting while Herlihy spoke, Bullman stood up and said that Herlihy had lied to him about something in one of the individual meetings and then had told another employee the exact opposite of what he had told Bullman. Dunagan testified that Herlihy told Bullman, "[Y]ou're a mother fucking liar." Herlihy also said to Bullman you are calling me a liar, you took a sick day off work to go door-to-door for the Union. Feldscher confirmed that, during the meeting, Bullman stated that Herlihy told Bullman that the employees' wages were determined by their knowledge of the job, but a half an hour later Bullman heard Herlihy tell another employee that wages were about longevity on the job. Feldscher testified that Herlihy started screaming at Bullman, and that he called him a "God Damn liar, started cussing him."

[43] Bullman testified that, following the meeting, he called Silhavy and told him that he thought that the Union lost its support to proceed with the petition because a lot of people bought into Respondent's new vacation program. Some employees who were union supporters stated in the meeting and that they were willing to give Campanale a 6-month chance because they knew they had 6 months before they could vote again. Silhavy replied that he was going to talk to his boss about pulling the petition, which he did do on January 18.

Cicchini testified that an employee said that Herlihy was lying to the group and Herlihy "kind of lost it." "He called him a God Damned liar." Cicchini went on to testify that "I have been around the Company a long time and I never saw anything like this happen, it was spontaneous and it was—was very concerned it might get out of control. I was sitting at the back of the room and I couldn't get up there fast enough because I didn't know, you know it was a very heated moment." Cicchini testified that he was sure that Herlihy did not reference Bullman's union activity during the exchange. Similarly, Campanale testified that Herlihy made a speech and "the major thing that came out of that was that a big deal was that he had called Tim Bullman a god-damn liar." When asked if Herlihy said anything about Bullman's union activity, Campanale testified, "Not that I recall."

Clearly, Herlihy, Cicchini, and Campanale's refusal to acknowledge that Herlihy called Bullman a liar at the meeting in reference to Bullman's calling in sick and then going out to meet with employees on behalf of the Union was undercut by the admission in Toneges' affidavit and by Toneges' subsequent testimony at the hearing that Herlihy made these remarks. Moreover, I find that the refusal of Herlihy, Cicchini, and Campanale to recall this part of the exchange was not due to a collective lapse in memory, but was done intentionally in an effort to avoid unfair labor practice findings based on Herlihy's remarks.

Toneges testified that, at the end of the meeting, employees were told management was going to leave the room and they could discuss any issues they had in determining if they wanted to work with a bargaining agreement. Toneges, Buckley, and Cicchini denied that Herlihy told employees they had to make a final group decision that day about their support for the Union. Toneges testified that the managers left the room and went down the hall to the right where they stood talking in a circle about 50 feet from the meeting room door.[44] Toneges testified that from where he was standing he could see employees as they left the meeting room. Toneges testified that Fesselmeyer was the first employee to leave the meeting, and then everyone started coming out together in groups of two's, three's, four's, and five's. Toneges denied that he kept track of who came out and when, although he testified that he thought that he would have seen everyone as they came out, unless his back was turned to them. He testified employees did not have to pass the managers in order to leave the hotel, but if employees looked to the right when exiting the room, they would have seen the majority of the members of management.

a. Analysis and conclusions

Herlihy Disparages Bullman and Creates the Impression of Surveillance of his Union Activities

The Board has held that words of disparagement alone pertaining to union officials or adherents are not sufficient to constitute violations of Section 8(a)(1) of the Act, absent other coercive statements. See *Sears, Roebuck & Co,* 305 NLRB 193 (1991). In *Tony Silva Painting Co.*, 322 NLRB 989, 993 fn. 5 (1996), the judge noted, with Board approval, that "[h]ere, there was unlawful interrogation coupled with disparagement, a combination more than adequate to support the violation." See also, *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 474 (1995), enfd. in pertinent part 97 F.3d 65 (4th Cir. 1996), where the Board concluded that the respondent violated the Act by, "making disparaging remarks about the [u]nion in the context of other coercive statements." See also *Webco Industries*, 327 NLRB 172, 173 (1998), enfd. 217 F.3d 1306 (10th Cir. 2000)."[45]

In *St. Thomas Gas*, 336 NLRB 711, 719–720 (2001), the Board approved the following standard for the establishment of the creation of the impression of surveillance:

> [T]he test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that their [sic] union activities had been placed under surveillance . . . The idea behind finding "an impression of surveillance" as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.

I agree with the General Counsel's contention that Herlihy's exploding at Bullman in front of the entire bargaining unit at the January 17, 2001 meeting by calling him a "god-damn liar" because he called in sick and then went out to canvas on behalf of the Union disparaged Bullman in front of all those present and created the impression that Bullman's union activities were under surveillance. I find that Herlihy's conduct, under the principles set forth above, is violative of Section 8(a)(1) of the Act. Bullman solicited signatures for the Machinists' petition, and subsequently made house calls for the Union on January 13, 2001, to gauge the Union's support. Yet, there is no evidence that Bullman solicited signatures for the petition in management's presence, or that he reported his activities in making house calls to any member of management. As to Herlihy's accusation that Bullman improperly filed a claim for sick leave, there is no showing that he was disciplined for such conduct, and no claim that calling him a liar in front of all of his coworkers was the manner in which Respondent elects to discipline its employees for engaging in such conduct, absent their participation in union activity.

b. Other allegations concerning the January 17 meeting

Complaint paragraph 5(i) alleges that:

> About January 16, 2001, Respondent required its employees to attend a captive audience meeting at the Marriott Hotel in

[44] I have credited Bullman and Feldscher's testimony that the management officials were standing much closer to the door than Toneges estimated.

[45] But see *Poly-America, Inc.*, 328 NLRB 667, 669 (1999), where the Board found that a junior foreman did not violate the Act by making disparaging remarks about a union although the junior foreman made statements violative of Sec. 8(a)(1) of the Act during the same conversation. I do not find this decision controlling here. The statements disparaging Bullman were made in the presence of the entire bargaining unit by a high-level management official in the context of other unfair labor practices by that same official and others.

> Indianapolis, Indiana and instructed its employees to make a final group decision that day about their support for the Machinists.

General Counsel witnesses Bullman, Feldscher, and Dunagan failed to testify that the employees were instructed to make a final decision that day about the Union, nor do I find that any of Respondent's witnesses gave testimony to that effect. Accordingly, paragraph 5(i) of the consolidated complaint is dismissed.

Counsel for the General Counsel argue at page 26 of their brief that:

> A further impression of surveillance was created when the supervisors remained outside the meeting room, in plain sight of employees who were exiting the meeting. . . . The managers waited outside of the room for up to forty-five minutes while employees left . . . the only logical conclusion is that the managers remained outside the room, rather than leaving the Marriott entirely, because they wanted to create an impression of surveillance among Respondent's employees. Thus, violating Section 8(a)(1) of the Act.

When I asked counsel for the General Counsel at the hearing if there was a complaint allegation about company officials waiting outside the meeting room following the January 17 meeting, the only response was, "It's somewhat related to the one allegations on 5(i)." Moreover, I do not find any complaint paragraph alleging that the managers standing near or outside the hotel meeting room was violative of the Act. While extensive testimony was drawn about this conduct at the hearing, Respondent only touched on it briefly in its posthearing brief. Noting the General Counsel's disclaimer at the hearing, I have concluded that this contention raised in the General Counsel's brief was not fully litigated. I am therefore refusing to find that Respondent's conduct of its supervisor's waiting outside the meeting room was violative of the Act.

6. Respondent's January 17 and February 12, 2001 e-mails announcing changes to its vacation policy

Toneges received an e-mail dated January 17, 2001, 05:07 p.m., forwarded to Toneges by either Campanale or Buckley. The e-mail contained an attached memo from Challis M. Lowe addressed to "All U.S. Officers/Directors and U.S. Human Resources Directors/Managers." Herlihy and Buckley were on the memo's distribution list. The memo informed management that the way vacation was to be calculated for 2001 was being changed, and it provided a worksheet showing how to calculate vacation. The top of the memo states:

> Important: The following message is confidential and not to be shared with your employees at this time until "revised" support materials are available to assist you in communicating this program change.

The memo also stated that, "[i]t is important for you to keep in mind and be sensitive to the fact that the modification to the one-time transition portion of the Vacation Program may result in a real and/or perceived loss of earned vacation time that employees will no longer receive." The January 17 memo also contained instructions that "the attached employee 'Post and Distribute' memo" was to be "immediately cop(ied) and post(ed)" "in a common area at your location/department." Management was instructed to distribute the memo to all of your employees by any means. The memo to Respondent's employees is dated January 17, 2001, and it states that the information that they received about vacation was incorrect and that unfortunately the information distributed was "too good to be true." It states that employees would be provided with more complete information in the next couple of weeks.

Toneges testified that he did not post or direct anyone to post the January 17, 2001 employee post and distribute memo at the East and West facilities. Toneges testified that he saw it posted at the Indianapolis West facility and that he thought this was sometime after the January 19 election was scheduled to take place, but he did not know who posted it.[46] Toneges did not see it posted at the Indianapolis East facility. Toneges testified that, while normally it would be his job to relay to employees the information contained in the January 17, 2001 post and distribute memo, he had asked Buckley to discuss the vacation packet with employees and that "I believe that he did the entire thing from start to finish." Yet, Toneges did not know when Buckley was back at the Indianapolis facilities after the memo issued.

Buckley testified that he received the January 17 e-mail concerning the vacation program on January 17 or 18 and that on receipt of such a document he would normally contact the human resource coordinators in each of the CBUs throughout the region to alert them that a communication was coming out about the vacation program. Buckley testified that when a memo says post and distribute it would be forwarded to the GMs or HR coordinators throughout the region. Buckley testified that it would have probably taken around 2 or 3 days to communicate the information to all of the employees throughout the region.

There was an e-mail dated February 12, 2001, from Respondent's Miami office, with the same distribution list as January 17, 2001 e-mail. The February 12 e-mail had Respondent's, "Revised United States Vacation Policy" attached to it. Toneges testified that the February 12 e-mail was forwarded to him and that he and Campanale gave the employees at the East and West facilities the information regarding the revised vacation program attached to the February 12 e-mail. Buckley and Herlihy were not there for the presentation. The revised vacation policy still excluded from participation, "those employees operating under a collective bargaining agreement."

Respondent's Manipulation of the Announcement of its New Vacation Policy Underscores the Coercive Nature of its Threats that Employees Would Lose that Policy if they Selected the Machinists

The evidence shows that on January 3 and 4, 2001, Respondent's high-level official Herlihy, in Buckley and Toneges' presence, touted to employees the benefits of Respondent's new vacation policy and informed them that they would not receive

[46] Woehlke testified that he posted the employee post and distribute pages of the January 17, 2001 memo at the West facility on an employee bulletin board. Woehlke did not know if he posted it before or after the January 19 scheduled election date.

these benefits if they were covered by a collective-bargaining agreement, and that Herlihy also told some employees they would not receive these benefits if they voted the Union in. Herlihy went into specific detail at the January 3 and 4 meetings as to the large gains in vacation time that would accrue to each employee under the new policy, and they were each afforded worksheets to calculate their expanded vacation time under the new policy. However, on January 5, 2001, Respondent's Miami headquarters issued an e-mail copied to Herlihy and Buckley, which was forwarded to Toneges stating that a "serious error" was made in the recently communicated vacation program, and that the one time transition component of the program was being modified. Thus, while Respondent's officials coopted the new vacation policy as part of its campaign strategy to convince employees to give the company another chance and vote against the Union, they failed to inform employees that the previously announced policy was under review prior to the election, although they were made aware of this about 2 weeks before the January 19, 2001 scheduled election.

Moreover, while they met with the entire unit at the Marriott Hotel on January 17, the testimony reveals that there was no discussion of the vacation policy at that time and I have concluded that management continued to mislead employees by their failure to apprise them that the policy was under review during this meeting. The January 17 meeting was reported on Respondent's typewritten schedule to end at 3 p.m. On January 17, 2001, at 5:07 p.m. an e-mail was sent from Respondent's Miami office stating the way vacation was calculated was to be changed, and that the new formula "may result in a real and/or perceived loss of earned vacation time that employees will no longer receive."[47] This e-mail contained a post and distribute memo for employees stating that the information they received on the vacation program was incorrect and that it was "too good to be true." Management was directed to immediately post the memo and distribute it by any means. Yet, Toneges, who testified that it would normally be his responsibility to post and distribute this memo, admitted he took no action on it. He incredibly claimed he left the matter to Buckley although he failed to testify that he contacted Buckley to ensure that Buckley acted on it. Buckley admitted to receiving the January 17 e-mail, but although he knew the election was fast approaching, he failed to take any action to notify the Indianapolis East and West employees before the scheduled election that they had been misinformed about the new vacation policy. While Toneges claimed that he thought it was up to Buckley to inform employees about changes in the vacation policy, he and Campanale gave the employees information pertaining to a February 12, 2001 e-mail relating to new vacation policy changes without Buckley's assistance. I have concluded that Respondent's officials intentionally failed to timely inform employees that they had been mislead about the new vacation policy as part of their plan to undermine the Machinists election petition and by this inaction, Respondent's officials further demonstrated their animus towards the employees' union activities and heightened the impact of their prior unlawful pronouncements concerning the vacation policy.[48]

7. Respondent discharges union supporters Allen Feldscher and Tim Bullman

a. Legal principles

In *Sears, Roebuch & Co.*, 337 NLRB 443 (2002), the Board set forth the following principles for determining whether an employee is disciplined or discharged in violation of Section 8(a)(3) of the Act:

> In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).
>
> The elements commonly required to support a finding of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993).

b. The February 12, 2001 discharge of Allen Feldscher

Feldscher began working for Respondent in 1979.[49] Feldscher started working at Respondent's Indianapolis East facility in August 1996. On August 11, 1997, Feldscher, signed off for the receipt of Respondent's "Employee Safety, Health, and

[47] The timing of the issuance of the January 17, 2001 e-mail, which closely followed the end of the Marriott Hotel meeting, is suspect. It was at Miami labor relation official Ihrig's suggestion, on being apprised of the Union's petition for election, that Herlihy and Buckley met to formulate a strategy for meeting with the Indianapolis employees. I, therefore, infer that Ihrig, who had been faxed a copy of the petition for election by Buckley, was also faxed a copy of Buckley's typewritten plan for meetings with employees. Had the vacation policy been revised prior to the January 17, 2001 Marriott meeting, it would have clearly been incumbent on management officials to advise the employees of that fact during the January 17 meeting, which was just 2 days before the scheduled election. Given the amount of resources Respondent devoted to defeating the Machinists' election campaign, and since the original strategy was initiated in Miami, the record suggests a further inference that Respondent's Miami officials took into consideration the date and ending time of the January 17, 2001 Marriott meeting, in deciding the timing of the issuance of January 17, 2001 memo revising the vacation policy.

[48] The changes in the vacation policy announced on February 12, 2001, from the one announced at the January 3 and 4, 2001 employee meetings resulted in a significant loss for employees for their 2001 vacations. For example, in example 4, GC Exh. 14, at p. 19 of the calculation sheet for the February 12, 2001 vacation plan, an employee would have 15 days vacation in 2001. In example 3, GC Exh. 11, at p. 8 under the vacation plan announced on January 3 and 4, 2001, an employee hired a year later with a similar anniversary date, would have received 27 days vacation in 2001.

[49] Feldscher's date of hire is reflected on his last evaluation.

Environmental Handbook," which contains a provision stating that "[t]he use of eye safety glasses is mandatory for everyone working in or entering all areas of the shop, fuel island, or wherever maintenance work is being performed." Feldscher transferred to Indianapolis West in November 1998, where he remained until his February 12, 2001 discharge. He was a service island attendant at the time of his discharge. Woehlke was the STO at Indianapolis West and Feldscher's supervisor during times relevant here.[50]

On February 3, 2000, Feldscher received a writeup for two incidents, occurring on February 2 and 3 for not wearing safety glasses while at work. The writeup states that, "[e]mployee needs to be reminded every day to put on safety glasses." "If this keeps up employee will be terminated." The writeup is listed as Feldscher's first and second warning. Feldscher signed off on an annual evaluation on February 15, 2000, where he received a "provisional" rating in the area of safety, which was the lowest rating on the chart. It was noted on the appraisal that Feldscher was written up on February 3, 2000, for not wearing safety glasses. On May 24, 2000, Feldscher received a "Notice of Safety Violation" which resulted in a 3-day suspension. The writeup was actually for two separate conduct violations. The first was for not wearing safety glasses on May 24, and the second states "Employee showing up for work late last one for the year 2000. Next late employee will be termination of employment." It also states in the writeup that Feldscher was given a 3-day suspension, that he was given and first and second warning for the same problem in the past, and that "[t]his is the last warning next time will be termination of employment." Then CSM Dusty Thompson and Woehlke signed off on Feldscher's May 24 suspension notice.

Feldscher signed the Machinists' petition on November 19, 2000. The Machinists filed a petition for election on December 11, 2000, which led to Respondent's upper-level management conducting numerous meetings with the employees at the Indianapolis East and West facilities as part of Respondent's strategy to defeat the Union. According to Buckley's typewritten schedule, Respondent's officials were sent there, in part, to "identify key participants," "analyze the two Indianapolis shops," and find "key issues to be addressed."

Cicchini met with Feldscher on December 18. During the meeting, Cicchini asked Feldscher what he thought the problems were at the Respondent. Feldscher said the evaluation system was unfair, complained about his February 2000 evaluation stating that he had not received a raise, and complained about how he was treated concerning his attendance and his wife's health. Cicchini took notes during the meeting. Thereafter, Herlihy and Buckley met with Feldscher in December. Herlihy had a folder containing notes with Feldscher's name on it. During the meeting, Herlihy asked Feldscher's concerns and Feldscher told him about an incident where he had been written up and suspended for being late when he had to take his wife to the emergency room. Feldscher also complained about the evaluation system and said that he thought that the employees needed a third party to represent them because it was too easy for Respondent to prevent an employee from receiving a raise.

I find, based on Feldscher's credited testimony about his meeting with Cicchini and then with Herlihy and Buckley, that Respondent's officials were aware that Feldscher had issues with certain of Respondent's practices, and that he informed Herlihy and Buckley that he was a union supporter. I have found Buckley, Toneges, and Woehlke's testimony that they thought Feldscher was against the Union not to be credible considering their demeanor and the shifting nature of the testimony.[51]

During the last week in January 2001, Feldscher heard through discussions with employees including tech in charge (TIC) Jim Frame that Respondent was going to make changes to the new vacation program that had previously been promised to employees. Feldscher testified management had scheduled a safety meeting around February 20, 2001, and he had made it clear that he was going to bring up the policy changes at the safety meeting because he thought that the employees had been lied to about the vacation policy.

Feldscher's testimony reveals that, on February 11, 2001, a screw fell out of his prescription safety glasses at around 11:40 a.m., and Woehlke caught him working in the shop without wearing the glasses shortly thereafter. At that time, Feldscher was finishing tightening the wheels on a truck, which Feldscher understood was scheduled to leave the facility by noon. Immediately on seeing Woehlke, Feldscher obtained a spare pare of safety glasses from another employee's toolbox. Woehlke told Feldscher to place jack stands underneath the truck Feldscher was working on as a safety precaution.

Following their encounter in the shop, but still on February 11, 2001, Woehlke agreed to Feldscher's request to provide Feldscher with Feldscher's evaluation and to conduct Feldscher's annual review. During the February 11, evaluation meeting, Woehlke asked Feldscher why he was not wearing his

[50] I found Feldscher, considering the witnesses' demeanor, to be a credible witness and have credited his testimony concerning the events leading to his termination over the testimony of Buckley, Toneges, and Woehlke in all instances where their testimony was in conflict.

[51] Woehlke testified he did not think Feldscher supported the Union. However, when asked if he discussed who supported the Union with anyone from management, Woehlke testified, "No." Woehlke's testimony then changed and he said he had a discussion with Toneges about who was in favor of the Union, but they thought Feldscher was a no vote. Toneges testified he kept a list of employees as to how he thought they would vote. Toneges discussed the list with Herlihy and Buckley on more than one occasion to try to determine whether an employee showed he was upset with the company during meetings with management. Toneges claimed he thought Feldscher was a no vote because he did not seem hostile and said several times he was willing to give management a chance. Buckley testified he attended biweekly management meetings where they evaluated how they thought each employee would vote. While Buckley could not independently recall Feldscher's name, when his name was suggested by Respondent's counsel, Buckley testified that, "I believe he was a no vote. Just our feelings and the feelings of the local management team." When asked if Feldscher asked any questions, Buckley testified, "I don't remember the exact questions that he might have asked but either he asked questions or, you know, just a feeling that we get from employees." Buckley then changed his testimony stating that he thought he remembered Feldscher telling him that he did not want a union there. Buckley could not recall any other specifics of the conversation.

safety glasses when Woehlke entered the shop. Feldscher responded he was finishing a truck that had to go out at noon and a screw had fallen out of his glasses making Feldscher unable to wear them. Feldscher said he was afraid he was going to break his prescription glasses.[52] Feldscher said the driver was waiting for the truck, he had two wheels to tighten, and so he finished the truck. Feldscher showed Woehlke his broken glasses. Woehlke told Feldscher they were enforcing the safety glasses issue and he needed to have a back up pair. Feldscher told Woehlke he had consistently worn his glasses since his 3-day suspension in May 2000. Feldscher said this was a fluke occurrence and the glasses were only broken for a minute or two before Woehlke saw Feldscher without them. Woehlke told Feldscher that an employee was transferring to another location, and Woehlke wanted to move Feldscher to the third shift so that Feldscher could obtain mechanical experience with the possibility that Feldscher could be promoted to T–1 mechanic. Woehlke said Feldscher needed to improve in the area of safety concerning the glasses, and he needed to work on his punctuality. Feldscher was told he was receiving $1-an-hour raise. Woehlke told Feldscher if he could improve in the discussed areas in 6 months he would probably be looking at another raise. Woehlke and Feldscher signed the evaluation on February 11, 2001. Feldscher's safety rating on the February 11, 2001 evaluation improved two categories from his 2000 evaluation to the rating of "Fully Competent." Feldscher's rating in work habits improved to 2.6 from 2.3 in the 2000 evaluation, and his overall rating improved to 2.72 from 2.46 in his 2000 evaluation.

When Feldscher reported to work on February 12, Woehlke told him to report to the office and Feldscher met Woehlke and Toneges there. Toneges asked what happened concerning the safety glasses, and Feldscher said a screw had fallen out and they broke. Feldscher said that he was finishing up the truck because the customer had to go. Toneges said that, after talking to Woehlke and running it past Buckley, they were going to discharge Feldscher for not wearing his safety glasses the day before. They gave him a termination letter signed by Woehlke as the supervisor, and Toneges as a witness. Feldscher signed under protest. All three signatures are dated February 12, 2001. Feldscher said he thought that, although he had prior problems concerning the glasses, the punishment was too harsh. Feldscher talked to Buckley, Woehlke, and Campanale after his discharge but they refused to reverse the decision.

Feldscher initially testified that between May 2000 and February 11, 2001, there was only one occasion where a supervisor told him he should be wearing safety glasses. Feldscher was working on a computer behind a service counter and Woehlke told him to put his glasses on. Feldscher later testified that on one occasion when he arrived at work in September 2000, while he was opening his toolbox, Toneges told him to put his glasses on. Feldscher testified he was just getting ready to start work at the time.

I find that the General Counsel has made out a prima facie case that Feldscher's discharge was unlawfully motivated. Respondent's officials had knowledge of Feldscher's support for the Union because he raised complaints about working conditions during December meetings with Cicchini, Buckley, and Herlihy and he informed the latter two that he felt the employees needed a third party to represent them. Respondent also harbored strong animus towards the employees' union activity as evidenced by the convergence of high level officials at the Indianapolis East and West facilities who conducted multiple meetings with employees to defeat the Union, and as well as by the independent 8(a)(1) violations of the Act committed by these officials. I also note that despite Feldscher's May 2000 suspension, in part for his failure to wear safety glasses, and the threat of discharge for future conduct contained therein, Woehlke tendered Feldscher's February 11, 2001 evaluation to him after seeing him without the glasses on that date. While Woehlke questioned Feldscher about not wearing his glasses during the evaluation meeting, he also gave Feldscher a markedly improved safety rating from his prior appraisal, and an overall improvement in Feldscher's performance as an employee. Woehlke announced that Feldscher was receiving a raise,[53] spoke of a possible promotion for Feldscher, and told him of the possibility of another raise in 6 months.

Since the General Counsel has made out a prima facie case of unlawful discharge, the burden shifts to Respondent to demonstrate that it would have taken the same action in the absence of Feldscher's union activity. I find Respondent has failed to meet this burden for the reasons set forth below. Here again, the testimony of Respondent's witnesses was marked by internal inconsistencies and inconsistent stories between witnesses.

Woehlke testified he talked to Toneges on Monday morning February 12, and let Toneges know about the February 11 incident concerning Feldscher's safety glasses and that Feldscher had been written up for prior safety glass violations. Woehlke testified it was Toneges' decision to terminate Feldscher for not wearing safety glasses, but Toneges had to make several phone calls. Woehlke testified he recommended discharging Feldscher to Toneges because Feldscher had prior warnings.

Toneges testified as follows: Toneges decided to discharge Feldscher on February 12, 2001, for not wearing safety glasses the day before. Toneges reviewed Feldscher's personnel file and considered Feldscher's suspension, prior warning, his performance reviews, and Woehlke's report of what transpired on February 11, 2001, in concluding that discharge was warranted. Toneges was not aware of Feldscher's prior written discipline until February 12, when Woehlke brought it to his attention. Toneges testified Woehlke told him on February 12, that Feldscher's "been suspended for this and I have told him several times since the suspension to put his safety glasses on."

Toneges became CSM for the Indianapolis area on September 15, 2000, and shortly thereafter in September 2000, he verbally warned Feldscher to put his safety glasses on. Toneges testified that since he became CSM, Woehlke, and Leadmen Mike Dunn and Jim Frame told him they had warned Feldscher about not wearing glasses. However, Toneges could not ex-

[52] The glasses cost about $155 with the Respondent and Feldscher splitting their cost.

[53] Woehlke testified Feldscher received an equity increase on February 11, 2001, based on a wage survey of area service areas, rather than a merit increase.

plain why Feldscher was only receiving verbal warnings when his May 2000 discipline indicated that he would be terminated for the next offense. Toneges also could not explain why there was no documentation for these verbal warnings in Feldscher's personnel file in that he testified that it was customary at Respondent to document verbal warnings. Toneges testified that he did not know about the May 2000 suspension when he gave Feldscher the verbal warning in September 2000. Toneges did not document this warning in Feldscher's file.

Toneges testified that the only time he talked to Feldscher about the February 11 incident was during Feldscher's February 12 discharge meeting. I do not credit Toneges claim that neither Feldscher nor Woehlke told Toneges that Feldscher's glasses were broken.[54] Toneges testified it would not have mattered that the glasses were broken, because as soon as he saw Woehlke, Feldscher put on another pair of glasses.

Toneges testified he asked Woehlke to call Buckley, let him know what happened, and for Woehlke to see if Buckley recommended termination. Toneges testified that following a staff meeting on February 12, Toneges asked Woehlke if he talked to Buckley, and Woehlke said Buckley had approved Toneges' recommendation to terminate. Toneges' testimony is at odds with that of both Woehlke and Buckley's here as neither testified that Woehlke phoned Buckley. Rather, Woehlke testified Toneges made some phone calls before deciding to discharge Feldscher, and Buckley also testified Toneges called Buckley and said Feldscher had prior write ups, that they could not continue to have this happen because he was going to get hurt and Toneges had to enforce the rules. Buckley agreed and recommended termination.

Toneges testified that anyone entering the shop is supposed to wear safety glasses. While he was not aware of anyone being discharged for the offense, Toneges testified he had issued both verbal and written discipline for not wearing the glasses.[55] Toneges issued separate written warnings for safety glass violations on February 12, 2001, to Indianapolis East employees Jan Land, Jacob Sebeschak, and Josh Sears. Toneges testified he witnessed the three employees not wearing the glasses on February 9, 2001, but he issued them the warnings on February 12, after Toneges had terminated Feldscher for the same infraction.[56] Toneges initially testified that, he previously worked at the Indianapolis East location as an STL, and that he had told these same three employees to put their safety glasses on "numerous times" in the past before issuing the February 12 written warnings. He testified that, despite the prior warnings, on February 9, 2001, he saw all three were not wearing the glasses, therefore he gave them each a written warning on February 12. While Toneges claimed he had talked to these employees numerous times about their failure to wear safety glasses, when pressed about specifics, Toneges' testimony changed and he now estimated that he had only talked to Land and Sears twice each and Sebeschak once about wearing the glasses before Toneges decided to issue them their written warnings on February 12, 2001.

Buckley's testimony concerning Feldscher's discharge was at variance from the other witnesses to this proceeding. He testified that he received separate phone calls from Feldscher and from Toneges and Feldscher told Buckley that he was suspended and could be terminated for not wearing safety glasses. Buckley asked Feldscher what happened and he said that he had been warned before but he forgot. Feldscher said he knew he was wrong that he probably should be terminated, but he would like to keep his job. Buckley asked if Feldscher talked to Toneges, and Feldscher said Toneges scheduled a meeting with him for the next day. I find Buckley's account relating to Feldscher's discharge to be not worthy of belief. There was no claim by any witness to the events that Feldscher was suspended, or that a meeting was scheduled for him to meet with Toneges the next day. Rather, Feldscher, Woehlke, and Toneges' testimony reveals that Feldscher was first told of any potential discipline over the February 11 incident, when Feldscher met with Toneges and Woehlke on February 12, and was informed that he was discharged. I also do not credit Buckley's claim that Feldscher told him that he just forgot to wear the glasses or that Feldscher admitted that he probably should be terminated.

Buckley testified that he has recommended termination for another employee for not wearing safety glasses. Buckley claimed the employee did not have any other warnings, he was terminated for not wearing safety glasses after he was given one chance but was caught without them on the same day as his initial warning. No records were produced to substantiate Buckley's testimony about this employee. Buckley testified if a supervisor saw an employee not wearing glasses on two separate occasions after being warned, Buckley would probably recommend giving the employee one more chance before termination. Buckley then changed his testimony stating one time after a warning he would recommend termination. Buckley testified that if an employee had been suspended for not wearing them there is no excuse.

I have concluded Respondent's defense concerning Feldscher's discharge is undermined by Respondent's officials refusal to acknowledge that they were aware of Feldscher's prounion stance. Moreover, inconsistencies in the testimony of Respondent's witnesses concerning the events leading Feldscher's termination sets forth an aura that the real reason for the discharge was not the one advanced by Respondent at the hearing. This is particularly so in light of Buckley's incredible claim that Feldscher called Buckley the day before the discharge told him that he was suspended and admitted that he probably should be terminated. I also do not credit Woehlke's testimony that he recommended to Toneges that Feldscher should be discharged over the incident, when subsequent to the

[54] In this regard, at one point in Woehlke's testimony he admitted that Feldscher told him that the glasses were broken. Similarly, I do not credit Toneges testimony that Feldscher told him that the glasses did not fit him and that he had not worn them for a week, but had worn other glasses.

[55] Toneges testified that he issued a final warning when Toneges was an STL at the Indianapolis East location to Dale Price for not wearing the glasses some time between January 1997 and September 2000. This warning was not produced at the hearing.

[56] Toneges testified that he prepared the discipline memos for these three employees prior to Woehlke telling him about Feldscher, but that the employees received and signed off on the warnings on February 12, 2001, after Feldscher was terminated.

incident but before the discharge Woehlke gave Feldscher a substantially improved safety and overall rating on his evaluation, and according to Feldscher's credited testimony Woehlke told Feldscher he was receiving a raise, discussed the possibility of a promotion, and the possibility of another raise in 6 months.

Toneges and Buckley's testimony reveals that Respondent had no fixed policy on how employees were treated concerning safety glass violations. Toneges, at first, testified he warned employees Land, Sebeschak, and Sears on numerous occasions about their failure to wear safety glasses, however, nothing was placed in their files despite these repeated warnings. On realizing that this undercut his position that Feldscher should be terminated over a similar transgression, Toneges' testimony changed and he only claimed to have previously warned two of the employees twice, and one of the employees once about not wearing safety glasses before issuing them written warnings on February 12.[57] Yet, here again the arbitrary nature Respondent's disciplinary policy about wearing the glasses was demonstrated, because no explanation was given why one employee was given a written warning after only one prior offense, while the other two employees were given two chances before they received a written warning. Moreover, while it was Toneges' testimony that employees required a written warning after one or two safety glass offenses, Buckley's testimony vacillated as to the severity of the penalty for not wearing safety glasses. Buckley finally testified he would recommend termination for the next time an employee failed to wear safety glasses after his supervisor had previously warned him only one time. Thus, according to Buckley, he would have recommended termination for the three employees who Toneges only issued written warnings to on February 12, 2001.

Finally, concerning Feldscher, while he was suspended and received a final warning, in part, for not wearing safety glasses in May 2000, the record shows that Respondent tolerated his subsequent failure for not wearing glasses without issuing subsequent discipline. For Feldscher testified that, subsequent to the May 2000 suspension, on one occasion Woehlke saw him working without the glasses, and on another occasion in September 2000 Toneges told Feldscher to put his glasses on. Yet, Feldscher was not terminated or even disciplined other than receiving an undocumented verbal reprimand on both of these occasions. Toneges also claimed to have received several reports from leadmen about Feldscher's failure to wear glasses, yet no action was taking against Feldscher.[58]

As set forth above, I have concluded that the General Counsel has established a strong prima facie case that Feldscher's discharge was unlawfully motivated. Considering the arbitrary manner in which employees were disciplined for safety glass violations, the fact that Respondent tolerated Feldscher's occasional lapses concerning the wearing of safety glasses over a long period of time after his May 2000 suspension, and the fact that Woehlke gave him an improved safety rating the day before his discharge I have concluded that Respondent has failed to establish that it would have discharged Feldscher on February 12, 2001, absent Feldscher's participation in union activity. Accordingly, I find that Feldscher was discharged on February 12, 2001, in violation of Section 8(a)(1) and (3) of the Act.[59]

c. The April 11, 2001 discharge of Tim Bullman

Bullman began working for Respondent as a T-1 technician in April 1995 and in October 2000, Bullman was promoted to T-3 technician, the position he held until his April 11, 2001 discharge. At that time, Bullman was working at Respondent's Indianapolis West location on the third shift. Bullman reported to TIC Carl Chitwood,[60] who reported to Woehlke.[61]

Bullman contacted Machinists Business Representative Silhavy in November 2000, he signed the Machinists' petition on November 16, and, shortly thereafter, Bullman began to circu-

[57] Counsel for the General Counsel stated at the hearing that the February 12, 2001 warnings to the three employees were not being alleged to be violative of the Act.

[58] While I have concluded that Feldscher did not fail to wear the glasses after the May warning, except for the two occasions specified in his testimony and again on February 11, 2001, I have also taken into consideration the number of times Toneges claimed to have received reports that Feldscher did not wear the glasses without his taking any action against Feldscher in viewing the pretextual nature of the reasons advanced by Respondent for Feldscher's discharge.

[59] Feldscher's discharge occurred within a month of the time the Machinists pulled its petition for election. Bullman's testimony reveals that technicians made statements during the January 17, 2001 Marriott meeting that they would renew their interest in the Union if Respondent did not follow through with its promises. The record reveals that Respondent's officials were quickly receiving reports of employees' union activities and I find that they were told about these statements. In this regard, the bargaining unit was small consisting only of 32 employees and included lead men who were closely aligned with Respondent. Feldscher also made statements to his coworkers shortly before his discharge that he planned to challenge Respondent concerning what he considered to be broken promises as to its vacation policy. I find that, although he was discharged shortly after the Union pulled its petition for election, Respondent terminated Feldscher as part of an effort to prevent the Union from resurfacing at its Indianapolis facilities.

[60] Chitwood and TIC Jim Frame are members of the agreed on collective-bargaining unit.

[61] I found Bullman to be a credible witness and have credited his testimony concerning the events leading to his termination, as well as what transpired on the day of his discharge. In crediting Bullman, I have taken into consideration two e-mails he issued in September 2001. In one he mistakenly identified a pension check he received from Respondent as a backpay check for his discharge and he sent a defiant statement to former coworkers proclaiming he received a backpay check. In the other e-mail, which by the format of the exhibit tendered showed that it made its way to Toneges, Bullman stated Respondent was found guilty of 90 percent of the unfair labor practices the Union had filed. Bullman was apparently mistakenly referring to the Region's decision to issue the complaint concerning some of the unfair labor practice allegations. Respondent argued at the hearing that these e-mails served to undermine Bullman's credibility. It was clear by his testimony and his demeanor at the hearing that Bullman was hostile to Respondent because he felt he had been unlawfully discharged. However, these e-mails were written by a lay person, who I believe unintentionally misinterpreted certain information that was provided him. I do not find these mistakes serve to cast doubt on Bullman's testimony at the hearing, which was based on his recollection of facts as they took place, not his interpretation of isolated information relating to this legal proceeding. For reasons previously stated, I did not find Toneges and Woehlke to be credible witnesses, and I have credited Bullman over their testimony in all instances where their testimony was in conflict.

late the petition among employees who worked at the Indianapolis East and West facilities. Bullman's activities in circulating the Machinists' petition were quickly reported to Woehlke who gave Toneges this information shortly after Thanksgiving. Woehlke also testified that he received reports from employees that Bullman was harassing them about the Union.

On December 18, Bullman was summoned to a meeting with Cicchini. During the meeting, Cicchini told Bullman that he wanted to know if he had any complaints with the Company. Bullman voiced complaints about the pay system and employee appraisals. Shortly thereafter in December, Bullman was called into a meeting with Buckley and Herlihy. Herlihy said cards had been filed, the Company was not going to recognize them, and there would be an election. During the meeting, Bullman asked how the pay system worked stating he could not get a straight answer as to whether increases were based on quality or longevity. Herlihy became upset and said, "[I]f you don't like it here why don't you pick up your toys and you go out the door." Bullman also told Herlihy that he intended to vote for the Union because the employees needed a union to get a fair shake.

Bullman attended a shift meeting on January 3 or 4, 2001. In attendance for management were Herlihy, Buckley, Campanale, Toneges, and Hatten. During the meeting, Herlihy extolled the benefits of Respondent's new vacation policy, but stated that employees covered by a collective-bargaining agreement would not be able to have the policy, and that the only way they could get it was if they voted no for the Union. Herlihy picked up a blank sheet of paper and told employees if they vote for the Union you have nothing, and that you had no benefits. Buckley showed a video to employees, after which Bullman raised his hand and disputed certain points raised in the video. Bullman said that deregulation came from the government not unions, and companies under bidding each other was the cause of their going out of business not the unions. The video showed employees at union meetings being yelled at when they asked questions. Bullman said this never happened at any of the meetings he attended. Herlihy also said that the Company was going to do a wage survey. Bullman raised his hand and took issue with manner in which he thought Respondent was going to conduct the survey. At the end of the meeting, Herlihy again held up the blank sheet of paper and repeated that this is what you get, and that if the employees voted for the Union they would not have the extra vacation days under the new vacation policy.

The same night of the meeting Bullman told TIC Frame that management unlawfully bribed employees during the meeting. Frame called Toneges over, and Bullman told him that Respondent had unlawfully bribed employees with extra vacation days with a no vote for the Union. Toneges called Buckley over who denied that Respondent had engaged in any unlawful activity. Bullman said if Buckley believed that he would have no problem with Bullman calling the Union and the Board and telling them that Respondent bribed employees with extra vacation days.

Bullman, along with employee Herb Asher, and two Machinists officials made home visits to employees on January 13, 2001, in order to assess the employees' commitment to the union campaign. On January 17, 2001, all 32 bargaining unit employees from the Indianapolis East and West facilities attended a mandatory meeting conducted by Respondent's officials at a Marriott hotel. During the meeting, Herlihy said if you signed a union card it was not too late to vote against the Union. Herlihy said the employees should trust the Company and give the Company a chance. Bullman asked Herlihy how he could ask the employees to trust management when Herlihy told Bullman employees were paid based on job performance not seniority, but Bullman overheard him tell another employee the reason some employees receive more money was due to seniority. Herlihy responded that Bullman was "a God-damned" liar, and that he was "F'ing lying." Herlihy said, "I am a liar just like you are a liar because you called in sick one night and then you also went on that Union blitz yesterday on your day off."

The Machinists withdrew its election petition on January 18, 2001, and the January 19, 2001 election never took place. However, Union official Silhavy sent a mailing to all the unit employees on March 5, 2001, in which Respondent's changes to promises concerning its vacation plan was discussed. Attached to the mailing was a blank copy of the Machinists' election petition for employee signature.

Bullman was discharged on April 11, 2001, for an incident that took place on March 27, 2001. On March 27, Bullman was assigned to work on a truck with a Thermal King refrigerator (refer) unit for a customer called Dixon Fish. Bullman told Chitwood that he was not qualified to work on the unit since he had no formal training in refrigeration. Chitwood gave Bullman the assignment any way which involved performing preventative maintenance on the refer unit, which is used to keep the cargo cold. Bullman's tasks on the refer unit included an oil and filter change, checking the fluids, battery cables, belts, hoses, and making sure that the refer unit decreased the trailer's temperature. Bullman performed the required preventative maintenance tasks, including pressure testing the system before changing the oil filter. Bullman then took off the oil filter and drained the oil. When Bullman went to find a replacement filter, he found that Respondent did not have Thermal King filters. Rather, Respondent was using Fleet Guard filters and Bullman noticed a sticker that said Dixon Fish oil filters for Thermal King units. Bullman installed one of these Fleet Guard filters on the Dixon Fish refer unit. Bullman then completed a preventative maintenance form (PM form) for the work he performed on the refer unit. Bullman testified that, after changing the oil filter, he did not restart the refer unit and check the oil pressure, although he checked off that he had completed this task on the p.m. form. Bullman explained that he did not restart then engine because he had checked for oil leaks before he had changed the filter. He testified that since the filter had been marked for the Dixon Fish unit he assumed that it was the right filter.

The next night when Bullman reported to work Frame told Bullman the Dixon Fish refer unit leaked because Bullman put in the wrong oil filter. Thereafter, Bullman told Chitwood that Frame said that the Dixon Fish unit leaked. Chitwood said that he knew about it. Chitwood asked Bullman if he restarted the motor after he changed the filter and Bullman said no that he

had assumed it was the right filter because it was marked Dixon Fish on the box. Chitwood told Bullman never to assume anything.[62]

On April 11, 2001, when Bullman reported to work, Toneges told Bullman to report to the conference room where Toneges, Woehlke and Bullman met.[63] Toneges asked if Bullman knew anything about an oil leak in a Dixon Fish unit. Bullman answered he had worked on one a couple of weeks earlier, and he made a mistake by putting the wrong filter on the unit. Toneges asked Bullman if he started the engine after he changed the filter. Bullman said he had not and he told Frame and Chitwood he had not and that he was sorry that he goofed, and that "I guess I'm going to get a letter for it and I said that's okay because I goofed." Toneges said Bullman was getting more than a letter that he was being terminated. Toneges said Bullman had falsified company documents when he falsified the PM sheet and he was being fired. Toneges wanted Bullman to sign a document stating that he was fired for falsifying company documents and Bullman refused. Bullman told Toneges the reason given for his discharge was "chicken shit," and Toneges ought to be man enough to tell him the real reason which was retaliation for his union activities and Bullman's going over Toneges' head when Toneges threatened Bullman's job while telling Bullman that he should leave young children alone at night. Toneges denied the accusation, and Bullman said that Toneges should be man enough to admit it. At that point Bullman invited Toneges out for a beer. Toneges said that was all they had to discuss and Bullman was terminated.

Bullman's credited testimony reveals that: Bullman, Toneges, and Woehlke left the conference room, and Bullman started to walk down the stairs. Toneges and Woehlke told him to use a different route to exit the building taking him through the lunchroom and through the shop where the rest of the employees were located. Woehlke mocked Bullman, a heavy set individual, by imitating the way he walked and the way he swung his arms as he left the facility. Bullman asked Woelke several times to leave him alone, and to let him just get in his vehicle and go home. Woehlke said that he was a Ryder employee and that Bullman was not, that they were on Ryder grounds and that Woehlke could do to Bullman whatever he wanted to do whenever he chose to do it. Bullman became upset and told him that if he came one step closer Bullman was going to knock him out of his tennis shoes. Bullman testified that "[h]e took one more step toward me and I grabbed him by the shirt and I pulled back my hand, like made a fist, and then I thought better of it, and I put it down, and I got in my vehicle and I went home."[64]

Bullman testified that there were people in the shop that had lost engines and never even received a warning letter. Bullman also credibly testified that Woehlke had instructed employees including Bullman to falsify documents in that Woehlke told employees to claim false tasks so that they could bill a customer and generate revenue for the shop. Bullman explained that during the winter of 2000 and 2001 truck brakes were freezing up in the lot requiring Respondent's employees to release the brakes. Woehlke told the employees they could not bill a customer for this work so he ordered them to generate a phony task, rather than list releasing frozen brakes on the repair records, so Respondent could bill the customer for the time.[65]

Former Respondent technician Dunagan testified that technicians Cain and Barnett changed a fuel pump on a truck each working on different ends of a shift change. Dunagan testified they did not put any coolant in the pump and that the technician taking over after the change of shift should have checked it, and probably should have pressure tested it to make sure there was no leak. Dunagan testified the failure to put the coolant in the system ruined the engine at a cost of about $10,000 for the company to replace it. Dunagan heard about this from the two employees who worked on the truck but neither knew whose fault the problem was. TIC Dale Price told Dunagan that the truck had to be towed. The techs were not disciplined over the

[62] Bullman admitted he knew he should have restarted the refer engine on the Dixon Fish unit and the fact that he had no prior refrigeration training had nothing to do with his failure to carry out this part of his assignment. Respondent witness T-3 mechanic Gregory Scott worked on the refer unit the day after Bullman performed the p.m. work on it. Scott testified the customer returned it to the facility with an oil leak and that oil was all over the truck cab, the windows, the front box of the truck, the hood, and on the steps on the right side of the truck. Scott testified there was a concern that the load of fish might spoil. Scott determined the oil filter Bullman had installed, as well as the filters Respondent had in stock, did not fit the refer unit. Scott found the old filter that Bullman had removed the night before, cleaned it up and reinstalled it in the unit. Scott testified that Bullman used the right replacement filter, but there was a problem with this particular truck in that the motor mount was in the way. Scott was able to complete the repairs in 45 minutes, and the cargo was saved.

[63] Bullman credibly testified that Woehlke did not speak during the meeting.

[64] Toneges testified that when they got outside Bullman turned around and put both hands on Woehlke's chest and pushed him and Woehlke went back about three steps. Woehlke testified that Bullman put one hand on Woehlke's shoulder and pushed him away from him. They each denied that Woehlke mocked the way Bullman walked. I have credited Bullman's testimony as to the manner in which he confronted Woehlke. I have also credited his testimony that Woehlke and Toneges intentionally directed Bullman to leave the facility in a way that he would have to pass by the other employees, and Woehlke mocked Bullman by imitating the way Bullman walked.

[65] Woehlke did not address this allegation in his testimony, although Respondent witness Chitwood denied it. Taking into consideration the witnesses' demeanor, I have credited Bullman over Chitwood, a longtime current employee, who was testifying on behalf of his employer. I also note that Respondent's vice president of maintenance, Jim Cade, issued a memo to management officials on April 30, 2001. Cade cited a practice he termed as "pencil whipping" PMs. Cade set forth an incident in the memo where a technician said he worked on a truck that was reported as having received preventative maintenance (PM) the day before, but it appeared to the technician that none of the PM work had been performed. He reported this matter to the STL and the branch STL, who allegedly told the tech when they get behind in PMs, they just fill out the PM with a pencil without actually performing the work. The branch STL also reportedly told the complaining technician to just do his job and to shut up. Cade took the anonymous technician's claims serious enough to circulate the technicians report to management, and warn them that "pencil whipping" is a dischargeable offense. Apparently, as Bullman testified concerning Woehlke, Cade thought that certain STLs were not above encouraging technicians to take credit for work that was not actually performed.

incident. Toneges testified he was aware Barnett and Cain worked on a truck where there was not enough coolant placed in the engine or none was added. Toneges testified two or three technicians worked on the truck and he was not sure which was at fault. Toneges testified this incident was not similar to Bullman's improperly filling in the p.m. report because there was no checklist these technicians had to sign stating that they made sure that the coolant was added.

Dunagan also testified he performed a radiator replacement job, but the truck showed up low in coolant about 4 or 5 days later with a cost of $85 in repairs to Respondent. Jay Tietz, the team leader at the shop, told Dunagan it was his fault because he did not check the coolant level. Tietz gave Dunagan a warning letter on May 11, 2001, documenting a verbal warning. Dunagan did not complete a checklist where he said he performed this activity on the truck. However, he did sign a paper stating that he had completed this job.

Respondent called Chitwood, TIC of Bullman's shift at the time of the oil leak incident, as a witness. Chitwood has worked as a mechanic for Respondent for 26 years. Chitwood assigned Bullman to work on the refer unit on March 27, 2001, and Chitwood spoke to Bullman about the oil leak the following night, and asked him if he restarted the unit after he finished work on the truck and Bullman stated he had not. Chitwood reported the incident and his conversation with Bullman to Woehlke. Chitwood testified he was not sure he would even have reported the incident to Woehlke if it had not involved an important customer. Respondent raised the argument, as part of its defense for Bullman's discharge, that employees were to be discharged for engaging in a practice called "pencil whipping" or falsely filling in p.m. forms without completing the work. However, long-term employee Chitwood testified he only became familiar with the term pencil whipping "through this proceeding." When asked if he had ever heard the term before the response was, "No. Not until just recently."

Respondent witness TIC Frame, who worked for Respondent for 19 years, gave testimony similar to Chitwood's. Frame testified he was surprised Bullman was fired over the incident. Frame testified he had never seen anyone fired before at Respondent, although he had heard of people being fired. Frame testified mechanics make mistakes all the time.

Woehlke testified Chitwood and Frame informed him of Bullman's conduct and Woehlke placed a message on Toneges voice mail about the incident, but the two did not actually speak until they each returned from vacation. Toneges testified he received a p.m. inspection report and a note from Woehlke when Toneges returned from vacation in April. Thereafter, when Woehlke returned from vacation on April 9, 2001, Woehlke told Toneges the TICs had told him about an oil leak on a refer unit, that Bullman had not restarted the unit to check for oil leaks, and that he improperly completed the p.m sheet stating that he did. Toneges called Human Resource Manager Roper, who told Toneges to get written documentation from the two TICs, and Toneges had Frame and Chitwood write reports of the incident.[66] Toneges then reviewed those reports and the p.m. sheet and concluded Bullman had falsified the p.m. sheet by stating he completed a task he did not do.

Toneges called Roper, who based on a provision in a book called "Ryder Corporate Guidelines," recommended that Bullman be discharged for falsifying a document. Toneges testified that there is a provision in the Corporate Guidelines, under the heading of "Embezzlement, Theft, Fraud, and Non-Monetary Irregularities," which lists several types of conduct, including "falsification of any reports submitted to financial or operational management." It is thereafter stated in this section of the Corporate Guidelines that, "any employee who violates any of the provisions of this agreement shall be subject to disciplinary action up to and including termination of employment." Bullman signed for the receipt of the Corporate Guidelines when he began his employment. Toneges testified the information contained in the p.m. reports is required by the U.S. Department of Transportation as part of the maintenance records for each vehicle. Toneges testified that it was his decision to discharge Bullman and Roper could only make a recommendation. Toneges told Campanale of the decision and Campanale concurred taking into consideration Roper's approval of the action. Toneges and Woehlke then met with Bullman and Toneges told him that he was discharged.[67]

Toneges testified he decided to discharge Bullman because he had checked off on the p.m. unit that he had restarted the engine and checked for oil fuel and coolant leaks and he had not done so. Toneges testified that using the wrong filter is not a serious offense by a mechanic. Toneges testified that he had made mistakes as a technician and not been terminated. Toneges testified that when he was hired his supervisor told him that he was replacing a technician who was fired for filing false information on a p.m. report. However, Respondent did not introduce documentary evidence to support Toneges' testimony about this alleged discharge.

Buckley testified that he was not contacted concerning the decision to discharge Bullman because Roper had replaced Buckley. However, Buckley testified he would recommend discharging an employee who admitted falsifying a p.m. sheet in that Respondent has terminated employees for falsification of documents without resorting to progressive discipline. Buckley testified that he had been involved with a couple of terminations for falsification of p.m. sheets and that they occurred in the last 3 years of his testimony. Buckley could not recall any specifics about these incidents including whether the employees had prior discipline, but he stated that this would not have been the determining factor. No records were entered into evidence supporting Buckley's testimony that employees had been discharged simply for falsifying a p.m. sheet.

Cicchini was also not involved in the decision to discharge Bullman. However, he testified that it is critical for a technician to restart an engine after he has changed the oil and filter. Cicchini testified that he would view it as a dischargeable of-

[66] Roper became the human resource manager for the Indianapolis area on April 1, 2001, when he replaced Buckley in that position. Buckley testified that Roper was not available to testify due to back problems.

[67] Since I have credited Bullman's testimony concerning the discharge meeting and as to what occurred as Bullman exited the plant, I have not repeated Toneges and Woehlke's description of those events.

fense for a technician to check off on a p.m. sheet that he had restarted an engine, when he had not done so after changing the engine oil and filter. Cicchini testified that "pencil whipping" is when somebody has falsified a PM sheet and just slashed through the sheet although they had not performed the work. Cicchini identified a message dated April 30, 2001, from Respondent's vice president of maintenance, Jim Cade, communicating the importance of doing a proper p.m. and stating that anyone caught in "pencil whipping" or condoning that activity would be terminated immediately. Cicchini testified that Cade's e-mail policy was a reiteration of a longstanding verbal policy of termination for "pencil whipping."

Analysis

I find that the General Counsel has made out a prima facie case that Bullman's discharge was caused by his participation in union activity. Bullman contacted the Machinists and circulated the Machinists petition to employees. An employee quickly reported Bullman's activity to Woehlke and Woehlke reported it to Toneges. Thereafter, Bullman, along with all other bargaining unit employees, was directed to attend a series of meetings conducted by high level Respondent officials scheduled in order to defeat the Union. During these meetings, Bullman stated that he thought the employees needed a union, and repeatedly challenged statements made by Herlihy as well as representations contained in Respondent's antiunion videos. At one point, Herlihy told Bullman that if he did not like working for Respondent he should pick up his toys and leave. During the January 17 Marriott meeting, when Bullman challenged certain representations by Herlihy about working conditions, Herlihy called Bullman a "God Damned liar," and Herlihy accused Bullman of calling in sick one night and then going out on a union blitz on his day off. In fact, Bullman made house calls on behalf of the Union on January 13, and employees reported this activity to Toneges and Herlihy as revealed by Toneges' testimony.

On March 5, 2001, Machinists official Silhavy sent a letter to every member of the bargaining unit where he challenged Respondent's actions concerning its vacation policy, and solicited employees' signatures on the Machinists' petition. Based on similar reports of union activity made by employees to management, and considering the small size of the unit, I infer that employees also reported to Respondent's officials that they received Silhavy's letter.[68] Thus, Respondent was aware of Bullman's union activity and of the Machinists' continued interest in organizing its facilities at the time it discharged Bullman, and Respondent, as evidenced by its unfair labor practices, some of which were specifically directed at Bullman, harbored strong animus towards employees union activities and to the activities of Bullman in particular. Accordingly, I find that the General Counsel has established a strong prima facie case that Bullman was unlawfully discharged.

The burden of persuasion shifts to Respondent to demonstrate that the same action would have taken place even in the absence of Bullman's union activities. I find that Respondent failed to meet this burden. Respondent witness TIC Frame testified that he was surprised that Bullman was discharged over the incident. TIC Chitwood testified that he might not have even reported the incident, if it had not involved an important customer. In this regard, Toneges testified that mechanics make mistakes all of the time. Toneges distinguished this incident from others by stating that it was Bullman's falsely filling in the PM report that led to his discharge not that he placed the wrong filter in the truck. Apparently, longtime employee Chitwood did not know the failure to fill in a p.m. report, standing alone, was such a serious offense.

I place little weight on either Buckley or Cicchini's testimony that, had they been consulted, they would have recommended Bullman's discharge. I found, considering their demeanor and the content of their testimony, that each of these individuals exhibited a willingness to say whatever they felt was necessary to advance Respondent's cause at the proceeding.[69] I do not credit Buckley's claim that he was aware of other employees being discharged solely for falsification of p.m. reports when he could give few details pertaining to those events, and Respondent supplied no records in support of his testimony. Cicchini cited an April 30, 2001 post discharge memo issued by Cade where Cade stated that "pencil whipping" was a dischargeable offense. Yet, the conduct described in Cade's memo was different than what Bullman was accused of doing. The term "pencil whipping" in Cade's memo appears to indicate a practice where the multiple items on a p.m. sheet are checked off as performed when in fact the technician has not performed any of the required preventative maintenance work. There is no claim that Bullman participated in this conduct. In fact, his testimony reveals that he had performed most of the work required by the p.m. sheet and that his replacing the old filter with a new one as part of this assignment lead to the oil leak. Moreover, Cicchini's claim that Cade's memo was a reiteration of a longstanding policy for terminating employees for "pencil whipping" was undercut by longtime employee Chitwood's admission that he had never even heard of the term until shortly before his testimony at the trial. Yet, the record reveals that part of Chitwood's responsibilities as a TIC was to report performance or behavior problems to Respondent's management.

The provision in Respondent's corporate guidelines that Toneges testified warranted Bullman's discharge is entitled, "Embezzlement, Theft, Fraud, and Non-Monetary Irregularities." This provision includes several transgressions such as: "conversion to cash of any checks made payable to the company,". . . "accepting, soliciting, or giving gifts, gratuities, or any other personal benefit or favor from or to suppliers," . . . "misstatement of travel or expense reports." In other words, the tenor of

[68] It is long been held that the Board will infer an employer's knowledge of union activities in circumstances warranting such an inference. See *Metro Networks*, 336 NLRB 63 (2001), and the cases cited therein.

[69] I previously found, for the reasons set forth above, that Buckley concocted the contents of a conversation with Feldscher in support of Respondent's decision to discharge that employee. Concerning Cicchini, while Toneges testimony confirmed that of Bullman's that during the January 17 Marriott meeting, Herlihy accused Bullman of lying because he called in sick and then went out to canvass for the Union, Cicchini testified to a certainty that Herlihy did not mention Bullman's union activity during their argument at this meeting.

the article is that employees are stealing, or manipulating their position with the company for personal gain. An employee having knowledge of any actions prohibited by this provision is directed to report it immediately to, "his or her supervisor, the Corporate Controller, or the Director, Audit Services Miami." I do not find that Respondent has established that this provision which also includes a prohibition against, "falsification of any reports submitted to financial or operational management" as drafted was meant to apply to an employee who made one misstatement on a routine p.m. report. Moreover, the provision itself did not require discharge for all transgressions that came under its fold. Rather, it provides that an employee "who violates any of these provisions of this agreement shall be subject to disciplinary action, up to and including termination of employment."[70] I find that Toneges' seizing on the "Embezzlement, Theft, Fraud, and Non-Monetary Irregularities." provision was pretextual and that the harsh nature in which he applied it to Bullman demonstrates that he fired Bullman, a long time employee with a good performance record, for his union activity.[71] This is particularly so, when Toneges directed Bullman, the leading union adherent, to walk past the other employees on the day of Bullman's discharge while Woehlke mocked Bullman as he exited the facility. I do not find that any statements or actions that Bullman made or took towards Toneges or Woehlke on the day of Bullman's discharge should constitute a bar to Bullman's reinstatement as Bullman's actions were clearly provoked by Respondent's unfair labor practices.[72] Accordingly, I find that Respondent discharged Tim Bullman on April 11, 2001, in violation of Section 8(a)(1) and (3) of the Act.

8. The suspension and written warning to Teamster Steward Otis Carpenter

Carpenter works for Respondent at Indianapolis North as a diesel mechanic and, at the time of the hearing, had been in Respondent's employ for about 24 years and a union steward for Teamsters Local 135 for over 20 years. Respondent has a collective-bargaining agreement with Teamsters Local 135 for the Indianapolis North facility.

Carpenter received a phone call from Bullman around November 2000, during which Bullman questioned Carpenter about unions. Carpenter testified that between November 2000 to January 2001, Carpenter spoke to Bullman about four or five times about the union organizing campaign at the Indianapolis East and West facilities.

Carpenter testified that, around early January 2001, he had a conversation with Toneges about Carpenter's concern about being stuck in a snowstorm while commuting to work, due to Carpenter's diabetes. Toneges suggested that Carpenter acquire insulated boots. Carpenter responded this would not help if he had to walk 4 or 5 miles in the snow. Carpenter testified he said to Toneges that he heard that Respondent was going to get the Machinists Union at the Indianapolis West shop and Toneges responded "there was some troublemakers down there and Tim Bullman was one." Carpenter testified Toneges went on to state that "there won't be no union once that that is took care of." Carpenter initially testified he called Bullman 3 or 4 days after his conversation with Toneges and told him about Toneges remarks. However, Carpenter later testified that Bullman told him that he had already been discharged, an event that took place on April 11, 2001, when Carpenter called Bullman to tell him about Toneges' statements. Carpenter testified that, when he told Bullman about Toneges comments, Bullman asked and Carpenter agreed to testify for Bullman with the NLRB. Carpenter testified that he gave an affidavit to the NLRB and he agreed to counsel for the General Counsel's representation that this took place around May 24, 2001.[73] Carpenter testified he probably also told Assistant Steward Eric Everson about his conversation with Toneges.

As a result of hearsay objections, counsel for the General Counsel questioned Bullman and Everson about their alleged conversations with Carpenter about Toneges alleged January 2001 remarks about Bullman via question and answer offer of proof. Bullman testified that Carpenter called Bullman around the middle of May 2001. During the conversation Bullman said that he had been fired. Carpenter then told Bullman that "I

[70] In fact, other sections of Respondent's disciplinary procedures could have applied to the conduct Bullman engaged in here. Respondent's employee handbook, entitled "The Company & You" lists conduct guidelines setting forth prohibited conduct including, "Any falsification or misrepresentation of facts, including on the Application for Employment, is not permitted." The handbook states "Company guidelines suggest that the supervisor give a verbal or written warning to the employee prior to action such as probation or discharge except for serious acts of misconduct where no prior warning is suggested."

[71] See *Sears, Roebuck & Co.*, 337 NLRB 443, 445 (2002), where in concluding that the reasons advanced for an employee's discharge were pretextual the Board noted that "the Respondent failed to establish that it used theft investigators in cases other than those where employees were accused of stealing money or appliances from the Respondent. No evidence was presented that theft investigators had been previously used to question employees for the work infractions allegedly engaged in by Iaci such as changing warranty dates." The Respondent here also did not show that it discharged other service technicians for similar infractions to that committed by Bullman. *Mission Valley Ford Truck Sales*, 295 NLRB 889 (1989), cited by Respondent is distinguishable from the present case. The judge there found the respondent would have terminated an employee for falsely stating that he performed a major transmission job on a vehicle, even absent his participation in union activities. The nature of Bullman's misrepresentation, while important, was far less significant in scope, and I have concluded that Respondent has failed to establish that it would have discharged him for this misconduct absent his union activity. This is particularly so where mistakes by technicians were routine at Respondent and went unpunished. Moreover, Bullman credibly testified that Woehlke instructed Bullman to falsify certain repair records in order to bill customers for work that would not normally be charged to their accounts. I do not find here, that given this practice, and the testimony of Frame and Chitwood that Respondent has established that Bullman would have been discharged, absent Bullman's union activities.

[72] See *Well-Bred Loaf, Inc.*, 280 NLRB 306, 319 fn. 51 (1986), holding that an employer cannot provoke and employee to the point he commits and indiscretion and then seize on this to terminate his employment.

[73] Counsel for Respondent was provided copies of two affidavits given by Carpenter, and Respondent's counsel did not take issue with the representation that the initial affidavit was dated May 24, 2001. Carpenter initially estimated that he gave the affidavit around February 2001, and then said that he was not very good with dates.

overheard Dave Toneges say that he needed to get rid of some trouble-makers from the east side and the west side shop that had activity in the union and that Tim Bullman was the—was the ringleader of the west side shop and the head trouble-maker, or something to that extent." Bullman testified that he thought that Carpenter told him that Campanale and Woehlke were present when Toneges made these remarks and that Carpenter just overheard the managers converse but did not participate in the conversation. Everson testified that Carpenter said that he spoke to Toneges and said that it looks like you are going to have a Machinists Union installed or a vote on a Machinists Union at your other facilities and that Dave Toneges replied that is what it looks like, but as soon as we get rid of a few people that will not be happening. He testified that Carpenter did not state that Toneges mentioned any names of employees.

Toneges testified he had a conversation with Carpenter, during the winter months, about the use of sick days. Carpenter was concerned about being written up if he was snowed in and could not make it to work. Carpenter said he was susceptible to cold weather because he is diabetic and his feet get cold because of poor circulation. Toneges asked if he owned a pair of insulated boots. This made Carpenter angry and, during the conversation, Carpenter said you have big problems at the East and West where you are about to get you a union. Carpenter said he knew the ringleader was Mike Reames. Carpenter said he knew Toneges did not think it was Reames, but he is a rat. Toneges replied he did not think Reames was for the Union and the conversation ended.

Counsel for the General Counsel citing *Dauman Pallet, Inc.*, 314 NLRB 185, 186 (1994), argue in their brief that, despite Respondent's hearsay objections I should admit Bullman and Everson's testimony as to their conversations with Carpenter as corroborative of Carpenter's version of his conversation with Toneges, and that I should credit Carpenter over Toneges as to the encounter. The problem here is that I did not find Carpenter, considering his demeanor, to be a very credible witness. Carpenter's testimony was marked by poor memory, solicited on occasion by leading questions, and it vacillated during the hearing. Moreover, both Toneges and Carpenter testified that their conversation took place in the winter months, with Carpenter stating that it occurred around January 2001. Carpenter testified that he spoke to Bullman about the union campaign about four or five times between November and January 2001. Yet, both Bullman and Carpenter testified that Carpenter did not relay Toneges' alleged threat to discharge Bullman until after Bullman's April 11, 2001 discharge and Bullman placed the conversation at mid-May 2001. I find it highly unlikely that, given their prior phone relationship marked by frequent calls, that if Toneges threatened Bullman's job as Carpenter claimed that Carpenter would not inform Bullman about it until 3 or 4 months after the alleged threat was made. Moreover, the inconsistencies between Carpenter's testimony and what Bullman testified he was told further convinces me that the conversation never occurred as Carpenter testified. Both Carpenter and Toneges testified that they were engaged in a conversation between themselves. Yet, Bullman testified that Carpenter told him that Carpenter merely overheard a conversation between three supervisors, and that Carpenter did not participate in the conversation. Accordingly, paragraph 5(k) of the consolidated complaint is dismissed.[74]

Carpenter testified he represented employee Steve Huckaby at a grievance meeting, which I have concluded took place on June 5, 2001. Present for management were Woehlke and Gerald Hamilton. Present for Teamsters 135 were Carpenter, Assistant Steward Everson, and Huckaby.[75] Carpenter testified this was a grievance meeting, although a grievance had not been filed at the time under the contract. He explained if there was a problem they would talk to management first, then if it could not be resolved, they filed a grievance. Carpenter testified Everson "pretty much held the meeting" and Carpenter did not say anything. Everson testified it was a disciplinary action meeting involving an attendance letter given to Huckaby. During the meeting, Everson asked why Huckaby was receiving the letter and Woehlke stated he was out of paid time days off (PTO days) and he was being given a letter relating to his attendance. Everson said in the past employees have been able to use any of their allotted days as PTO days, meaning holidays, and vacation days. Woehlke disagreed. Contrary to Carpenter, Everson testified Carpenter actively participated in the meeting and that Everson, Carpenter, and Woehlke argued about the matter. Everson testified Carpenter spoke about as much as Everson did during the meeting. At one point, Everson and Carpenter stated that the Teamsters would file a grievance. Everson testified Woehlke took the position "that myself or Otis Carpenter was threatening him." Everson explained they were not threatening him and the meeting was over. Everson denied saying anything that could be taken as a threat.

Woehlke gave the following account of the meeting concerning Huckaby's warning letter as taken from Woehlke's testimony at the hearing and a statement Woehlke signed for Respondent's officials dated June 12, 2001. On June 5, 2001, Woehlke asked Huckaby, "[I]f I could see him in my office or would he like to wait until he had Union representation. Steve stated he would like to wait." Subsequently a disciplinary meeting took place and the two union officials attended it. The union officials' attendance was customary at meetings of this nature. The purpose of the meeting was to give a verbal warning to Huckaby for taking more than his 5-PTO days off, which related to abuse of sick leave. Woehlke brought Huckaby in the office, read the warning to him, explained why he was receiving it, and asked if he would sign it, which Huckaby refused to do. When Woehlke handed the warning to Huckaby both Huckaby and Carpenter grabbed it, and then Carpenter began to ask Woehlke questions. Carpenter asked if Woehlke knew employees were cleaning tankers on Friday June 1, and that there were fumes in the air which might have made Huck-

[74] While I do not credit Carpenter's testimony as to the alleged threats made by Toneges in the above conversation for the reasons specified above, I do credit Bullman's testimony that Carpenter reported to him that he overheard Toneges making the remarks that Bullman testified about. As I said before, I found Bullman to be a credible witness, and the evidence reveals that Carpenter gave an affidavit to the Board on May 24, 2001, when Bullman, on hearing Carpenter's claim asked him to serve as a witness for Bullman concerning his discharge.

[75] Huckaby and Hamilton did not testify during this proceeding.

aby sick. Carpenter also asked if Woehlke was a chemist. Woehlke said he was not a chemist and he did not know what Carpenter was talking about because Woehlke was on vacation that day. Huckaby said he informed Toneges of the problem, and Toneges went to the fuel island and said he did not smell anything. Woehlke asked Huckaby, if he felt something at work was making him sick, why he did not go to the clinic at that time. Huckaby did not respond. However, Carpenter asked Woehlke if he was a doctor. Woehlke said that he was not a doctor. Carpenter then said some of Respondent's shop employees were on medication for depression and if you keep writing people up they may come in and shoot up the place because it happens all over the place. Carpenter said he hoped that he was not around if it happens here. Woehlke testified that he did not know how to take this statement, but it upset him. The discussion continued and at some point Carpenter said Woehlke was already in trouble with the NLRB because Carpenter was a member or somehow involved with it. Woehlke asked Carpenter what he was talking about and Carpenter refused to respond.[76] During the meeting, Carpenter said when we go to arbitration, "I am going to stick it in your ass and break it off."[77] Woehlke asked Carpenter if he was threatening him, and Carpenter said he was not threatening Woehlke.[78] Woehlke's stated, in his June 12, 2001 statement, that he thought Carpenter was referring to a meeting scheduled for June 6, on Carpenter's 5 day PTO limit. Woehlke asked Carpenter to return Huckaby's warning, and Carpenter did so. Woehlke reread it to everyone in the room, and the meeting ended.

I have credited Woehlke's account of the Huckaby warning meeting, as set forth above, over that given by both Carpenter and Everson. I also credit Everson's testimony that they told Woehlke that they intended to file a grievance over Huckaby's discipline. Carpenter claimed that he did not say anything at the meeting, but let Everson do all the talking. This claim is undermined by Everson's testimony that Carpenter was a full participant. I also view it highly unlikely, taking into consideration the demeanor of all three witnesses that Carpenter, the senior steward, would have had nothing to say while Everson and Woehlke argued about Respondent's procedures. In crediting Woehlke's testimony concerning this event, I have considered the fact that I did not find him to be a reliable witness as to other matters. However, he testified in a more thorough fashion about this event then he did about others, and I have found the testimony of the union officials in part served to verify his account. I also note that I observed his demeanor through all aspects of his testimony, and found his testimony about the contents of this meeting to be more reliable than his testimony elsewhere at the hearing.[79]

Woehlke testified that he wrote on a piece of paper what transpired during the Huckaby meeting, and that on the morning of June 6, Woehlke left a voice mail for Toneges to call him. At Woehlke's request, he and Toneges met with Campanale on the afternoon of June 6. Woehlke testified that he reviewed with Campanale two statements made by Carpenter at the June 5 meeting that he felt were threatening. Then Toneges called human resources and spoke to Roper, at which point Woehlke reviewed the matter again for Roper on a speaker phone with Toneges and Campanale in the room. Roper and Campanale also had a discussion about it with Roper, after Woehlke left the room.

Carpenter testified that he attended a grievance meeting for himself, the day following the Huckaby meeting, which would have been June 6. Carpenter testified that Woehlke, Toneges and Campanale attended the meeting for management. Carpenter testified that following this meeting, he and Toneges had a discussion about vacations, and Toneges said it was Respondent's intent to eliminate vacation time in January that the employees could carry over from the prior year. Toneges said this was happening companywide, to which Carpenter replied that they have a contract. Carpenter testified that Toneges said that, "I wasn't going to last too long around there making testimony to this NLRB." At that point the conversation ended.

Toneges admitted having a conversation with Carpenter about vacation time, but testified differently to the substance of the conversation and stated that it occurred earlier than Carpenter portrayed it. Toneges also claimed that he did not know that any employees gave affidavits to the NLRB prior to the unfair labor practice hearing in December 2001, and that prior to that time he did not know that Carpenter had given an affidavit.

In considering the witnesses demeanor, as well as established and admitted facts, I have credited Carpenter's testimony concerning his June 6, 2001 conversation with Toneges over that of Toneges. First, Woehlke stated in his June 12, 2001 investigatory statement for Campanale, that during the June 5, 2001, Huckaby disciplinary meeting, Carpenter said Woehlke was in trouble with the NLRB because Carpenter was somehow involved with it. Woehlke also confirmed, in his statement, that there was a June 6 grievance meeting for Carpenter, as Carpenter testified. Moreover, Toneges had given an affidavit to the Region as recently as May 22, 2001, responding to employee accusations so he was somewhat familiar with Regional Office procedures by his June 6, meeting with Carpenter.[80] I also find

[76] Woehlke's testimony varied somewhat at the hearing about Carpenter's NLRB remark from that contained in Woehlke's June 12 statement. I have credited the statement contained in Woehlke's June 12, 2001 statement over his testimony at the hearing as the statement was given much closer in time to the event.

[77] Here again, I have credited the statement contained in Woehlke's June 12, 2001 statement over Woehlke's testimony at the hearing about this remark. I have concluded that the statement on June 12, was made much closer to the event, and before Woehlke had a chance to embellish his testimony at the hearing.

[78] I have credited Respondent's investigatory statement given by Respondent official Hamilton who said Carpenter said he was not threatening Woehlke. This statement confirms Everson's testimony that there was a denial of a threat being made.

[79] In crediting Woehlke, I have taken into account that an adverse inference could be drawn by Respondent official Hamilton's failure to testify. Nevertheless, I found Woehlke to be the more credible witness about the contents of this meeting than the two union officials and I have credited his testimony for the reasons stated.

[80] Carpenter gave an affidavit to the Region on May 24, 2001, and there is a likelihood that the Region advised Respondent of the nature of the allegations contained in that affidavit by the time that Toneges and Carpenter met on June 6, 2001.

Toneges' testimony that he was not aware that any employees gave affidavits prior to the time of the trial or aware that Carpenter gave an affidavit to be somewhat disingenuous. Carpenter filed an unfair labor practice charge on July 16, 2001, and he listed Toneges as the employer representative to be contacted on the charge. Toneges' testimony reveals that he gave three affidavits to the Region prior to the trial. He impressed me as an intelligent individual, and I infer he was aware that he was called on in these affidavits to answer allegations relating to prior sworn statements of employees including that of Carpenter since Carpenter had filed an unfair labor practice charge. In view of the timing of Carpenter's allegation pertaining to Toneges' remark, that is the day after Carpenter told Woehlke that he was in trouble with the NLRB and that Woehlke testified that he reported this conversation to Toneges and Campanale, I find Toneges violated Section 8(a)(1) of the Act on June 6, 2001, by threatening Carpenter with discharge because he gave testimony to the NLRB as Carpenter testified.

Carpenter received a call at home on June 8, 2001, from Campanale, during which Campanale told Carpenter that he was suspended indefinitely. Following the phone call with Campanale, Carpenter called Everson and told him what happened. Carpenter told Everson to take a witness to Campanale's office and ask Campanale why he suspended Carpenter.[81] Carpenter received a call from Campanale about 3 or 4 days later and he was told that Campanale wanted to take a statement from him. Carpenter agreed as long as he could bring a business agent. Carpenter gave a statement typed by Campanale, dated June 14, 2001. The statement reveals that Carpenter said he attended a first-step grievance meeting concerning Huckaby's absenteeism. In the statement, Carpenter denied making the statement during the meeting that he was going to take "the matter downtown and stick it in your ass." He also denied stating there were a lot of guys on medication, that when they ask for sick days and do not get it, they might start shooting up the place. Campanale took separate statements from Huckaby and Everson on June 13, 2001, and they also denied that Carpenter made these two statements that Woehlke attributed to him.

Supervisor Gerald Hamilton gave Campanale a statement on June 13, 2001, in which Hamilton stated the following:

> Rich said his decision was based on the contract. And they said that they would take it downtown and fight it. Also Otis said that they would take it downtown and break if off in your ass. Rich then said are you threatening me Otis? Otis replied no I'm not threatening you. That was pretty much it and there was something else said by Otis that there were like 4 guys out there on medication and if they call in for a sick day and they don't get it, who knows what they would do maybe they would come in and shoot the place up. I wouldn't want to be here.
>
> Steve had brought up fumes from next store at Rock Island from a prior day. He said that the fumes make him sick. Steve said mgt didn't do anything. Rich told him that if he felt that if he needed to go to the clinic then he should have done that.
>
> After they closed it up, they agreed to disagree and Steve refused to sign the letter.

Campanale asked Hamilton, in his statement, if Hamilton felt it was a threatening situation, and Hamilton replied, "It was an uncomfortable situation." Hamilton stated that "[t]here was tension and raised voices at times."

Campanale called Carpenter around 2 weeks after the outset of his suspension and told Carpenter he had checked the statements of other people and that Carpenter could come back to work with full backpay. Carpenter returned to work the next day, and he was told to attend a meeting with Everson, Campanale, Toneges, and Woehlke. During the meeting, Toneges gave Carpenter a zero tolerance letter. The letter, dated June 20, 2001, accuses Carpenter of engaging in unacceptable behavior toward management, and of creating a hostile work environment by making a member of management feel uncomfortable. The letter states that "[i]f you do repeat the type of conduct that led to this warning, you will be subject to further disciplinary action, up to and including termination." Carpenter said that he thought he had proven himself innocent and refused to sign the letter. Carpenter has received full backpay for his suspension.

Campanale testified Roper made the decision to suspend Carpenter pending investigation based on details Campanale provided. The investigation and suspension of Carpenter was based on what Woehlke reported to Campanale. When Carpenter returned to work, he was issued a final written warning based on the same situation for which he was suspended. Campanale, with guidance from Roper, made the decision to issue the final written warning. The decision was made after Campanale had taken statements from everyone involved.

Campanale testified that the Huckaby meeting was a disciplinary meeting for one of the technicians, and Carpenter and another steward attended as a witness. Campanale testified that usually a union steward or alternate steward act as a witness at this type of meeting. Campanale felt that if Carpenter did make the alleged remarks it could have meant a threatening situation and that was why he conducted the investigation. Campanale relied on the five statements he took from the people who attended the meeting to determine what Carpenter said and how he acted. Campanale concluded, based on his investigation, that Carpenter made the two statements Woehlke accused him of making in that Campanale believed Woehlke and Hamilton's signed statements over the denials of the three employees. Campanale concluded that it was not a threatening situation because one of the managers and all three employees stated that it was nonthreatening, although Woehlke felt threatened by it.

[81] Everson confirmed that Carpenter called him, and that after speaking to Carpenter, Everson went into Campanale's office. Everson asked Campanale to explain why Carpenter had been suspended. Campanale said based on his actions toward a supervisor during the meeting a couple of days earlier Carpenter was indefinitely suspended. Campanale did not state what those actions were and Everson did not ask. Campanale said that maybe he did not make it clear to Carpenter the reason he was being suspended. Carpenter testified that Campanale called him three times the day that he was suspended. However, Carpenter admitted that he only referenced one conversation with Campanale notifying Carpenter why he was being suspended in an affidavit that Carpenter had given to the Region in July 2001.

However, Hamilton stated that it was an uncomfortable situation. Campanale testified Toneges had no input in the decision to discipline.

The General Counsel alleges that Carpenter's June 8 suspension, and his June 20, 2001 final written warning are violative of Section 8(a)(1), (3), and (4) of the Act. It is contended that while no grievance was filed that the stewards attended the June 5 meeting not just to serve as witnesses but to represent Huckaby in their capacity as stewards and to argue the merits of the discipline, therefore, they were engaged in protected activity. Respondent contends Campanale acted reasonably in suspending Carpenter pending investigation once he received credible evidence that Woehlke, a supervisor, had been threatened. On investigation of the alleged threat, Campanale concluded that the conduct was not severe enough to warrant a suspension, reinstated him, and gave him full backpay. Respondent contends that Carpenter was not involved in a grievance meeting since no grievance had been filed on behalf of Huckaby. Respondent also asserts at page 35 of its posthearing brief that the meeting was not an investigatory meeting under the *Weingarten* decision[82] "because the meeting was for issuing discipline, not for investigating whether it would be appropriate to do so." Respondent contends therefore that Carpenter was not engaged in protected activity when he aggressively addressed Woehlke in the meeting, that he was proceeding on his own behalf and that these complaint allegations should be dismissed. As to the 8(a)(4) allegation, Respondent asserts it has no way of determining which employees gave statements to the Board.

The Board has held that holding the office of union steward is protected activity under Section 7 of the Act, and that activities by a steward in relation to a contractual grievance procedure are protected activities. *Limbach Co.*, 337 NLRB 573 (2002). Carpenter credibly testified that he viewed the June 5, 2001 meeting concerning Huckaby at a grievance meeting, although no grievance had been filed, because it had been the practice of the parties for union officials to attend these meetings to decide whether to file a grievance.[83] Campanale, Woehlke, and Everson agreed with Carpenter's statement that it had been the practice of the parties for union stewards to attend these disciplinary meetings. Moreover, Woehlke's written statement that Campanale relied on as the principle basis for disciplining Carpenter stated that Carpenter and Everson only attended the meeting after Woehlke voluntarily asked if Huckaby wanted union representation.[84] Once at the meeting, Carpenter and Everson acted in their capacity as union stewards. They protested Woehlke's predetermined decision to discipline Huckaby. They argued that there were fumes at the plant that were improperly impacting on unit employees, and questioned Woehlke's application of the contractual PTO procedures. Carpenter also stated that they were going to take a grievance over the discipline to arbitration. I find that Carpenter was engaged in his representational capacity as a union steward when he attended Huckaby's meeting, and that Respondent's officials knew he was acting in that capacity as Woehlke's statement reveals that he was invited to the meeting under the premise of providing Huckaby with union representation.

It was held in *Caterpillar, Inc.*, 322 NLRB 674, 677 (1996), that:

> The Act has ordinarily been interpreted to protect the employee against discipline for impulsive and perhaps insubordinate behavior that occurs during grievance meetings, for such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts. *Postal Service v. NLRB*, 652 F. 2d 409, 466 (5th Cir. 1981).

I do not view any of the comments Woehlke attributed to Carpenter as sufficiently flagrant to have crossed the line to remove Carpenter from his protected status as a union representative and thereby allow him to be disciplined for what was otherwise protected union activities. In *Leasco, Inc.*, 289 NLRB 549, 552 (1988), the statement "I'll kick your ass" made during a labor dispute was found to be nonthreatening and nothing more than "a profane colloquialism used commonly to verbalize the speaker's desire to prevail over another person or group," and that "standing alone in its ordinary usage, it does not convey a threat of actual physical harm." Similarly, I do not find Carpenter's statement that employees on medicine in the shop might take umbrage and act in a violent fashion to being written up to constitute a threat. There is no claim here that Carpenter had any control over these employees, or that he made any threat to instigate them to act out in any way. Even Woehlke testified that he did not know how to take the statement. Moreover, when Woehlke asked Carpenter if he was threatening Woehlke during the meeting, Carpenter denied doing so. Furthermore, the meeting did not immediately end after Carpenter made these remarks, as management statements

[82] *NLRB v. Weingarten*, 420 U.S. 251 (1975).

[83] The collective-bargaining agreement provides at step 1 of the grievance procedure that employees shall record their grievance on a grievance blank and present it to the shop steward. Shop steward's duties under the collective-bargaining agreement include "the investigation and presentation of grievance with his Employer."

[84] I agree with Respondent's contention that this was not an investigatory interview under the Supreme Court's *Weingarten* pronouncements. For Woehlke's testimony and statement reveal that Huckaby's warning had been prepared prior to the meeting, and that Woehlke read the warning to Huckaby at the outset of the meeting and asked Huckaby to sign it. It was at that point in time that Woehlke and the union officials began to debate the merits of the warning. The Board has viewed permissible conduct by a union representative during what has been defined as a *Weingarten* investigatory interview to be more restrictive than what is tolerated in grievance or other collective-bargaining settings. In this regard, a steward while they can counsel an employee in a *Weingarten* setting cannot interfere with the legitimate employer prerogative of investigating employee misconduct. See *Yellow Freight System*, 317 NLRB 115, 123–124 (1995). Since, I have concluded, in agreement with Respondent, that this was not an investigatory interview, I agree with the General Counsel that the parties' past practice reveals that the union steward's customarily attended these disciplinary meetings in an adversarial role as an adjunct through past practice to the contractual grievance procedure. Woehlke invited the stewards to attend the meeting, and Woehlke and Campanale did not take umbrage with the stewards debating Huckaby's discipline at the meeting. Rather, it was the language that Carpenter used which caused Campanale to suspend Carpenter and then to issue him a final warning.

reveal that the conversation continued and as Hamilton said at the end of the meeting the parties agreed to disagree.

Campanale in his haste to place Carpenter on indefinite suspension did so without even talking to Hamilton the other supervisor who attended the June 5 meeting. Hamilton was not interviewed until June 13, 2001, 5 days after Carpenter was suspended. At that time, Hamilton stated that the situation was not threatening but "uncomfortable" in that "there was tension and raised voices at times." Hamilton's statement concerning the plurality of raised voices reveals that Carpenter was not the only one to act in an aggressive fashion in this dispute which related several aspects of Respondent's terms and conditions of employment including the serious allegation that Respondent was allowing fumes to penetrate the workplace. I find that Carpenter's suspension and subsequent written warning were plainly motivated by his protected activities as a union steward.

Campanale also placed Carpenter on suspension on June 8, which was 3 days after the June 5 meeting where Carpenter reported his involvement with the NLRB to Woehlke, and 2 days after Woehlke relayed Carpenters comments to Campanale and Toneges. On June 6, 2001, after Carpenter attended a grievance meeting with Campanale, Toneges, and Woehlke, Toneges threatened Carpenter's job with the accusation that Carpenter had given testimony to the NLRB. I find that Campanale's haste to place Carpenter on indefinite suspension, on June 8, without even questioning Hamilton about what took place at the meeting was motivated by animus towards Carpenter's strong advocacy as a steward and by Carpenter's statement of his involvement with the NLRB, and that Carpenter was suspended on June 8, and issued a final written warning on June 20, 2001, in violation of Section 8(a)(1), (3), and (4) of the Act.

9. The General Counsel's request for a bargaining order

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613–614 (1969), the Court stated that in considering whether a bargaining order is an appropriate remedy the Board should consider three categories of unfair labor practices. The first is where a respondent's unfair labor practices are so "'outrages' and 'pervasive'" that their "effects cannot be eliminated by the application of traditional remedies" thereby eliminating the possibility of a fair election. In these circumstances, a bargaining order can issue "without the need of inquiry into majority status." The Court noted that:

> The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a Section 8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices. See e.g., *United Steelworkers of America v. N.L.R.B.*, 126 U.S. App. D.C. 215, 376 F.2d 770 (1967); *J. C. Penney Co., Inc. v. N.L.R.B.*, 384 F.2d 479, 485–486 (C.A. 10th Cir. 1967).

In *Gissel Packing*, supra at 614, the Court delineated a second category of cases "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." The Board has the discretion to issue a bargaining order for this category of cases, "where there is also a showing that at one point the union had a majority" A bargaining order will obtain in this category of cases, "[i]f the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies . . . is slight and that employee sentiment once expressed through cards would, on balance, be better protected."

In *Gourmet Foods*, 270 NLRB 578, 587 (1984), the Board majority held that "we do not believe we would ever be justified in granting a nonmajority bargaining order remedy." Member Zimmerman, in dissent, stated:

> I adhere to the view expressed by the majority in *Conair Corp.*, 261 NLRB 1189 (1982), and shared by several courts of appeals, that the Board has the authority . . . to impose such an order in exceptional unfair labor practice cases, described by the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613–617 (1969). Not only does the Board have such authority, it should exercise that authority in cases of the most flagrant and egregious unfair labor practices. [Id. at 588–589.]

Member Zimmerman cited the following appellate authority in support of the issuance of a minority based bargaining order:

> United Dairy Farmers Cooperative Assn. v. NLRB, 633 F.2d 1054 (3d Cir. 1980); NLRB v. S. S. Logan Packing Co., 386 F.2d 562 (4th Cir. 1967); J. P. Stevens Co. v. NLRB, 441 F.2d 514 (5th Cir. 1971); NLRB v. Montgomery Ward & Co., 554 F.2d 996 (10th Cir. 1977); Ona Corp. v. NLRB, 729 F.2d 713, 714 fn. 4 (11th Cir. 1984). Contra Conair Corp. v. NLRB, 721 F.2d 1355 (D.C. Cir. 1983) (Wald, J., dissenting). [Id. at 589 fn. 1.]

See also *NLRB v. Horizon Air Services*, 761 F.2d 22, 28 (1st Cir. 1985).

In *Nabors Alaska Drilling, Inc.*, 325 NLRB 574 (1998), a three member Board panel declined to reverse the *Gourmet Foods* decision. However, then Chairman Gould issued a strong dissent contending that *Gourmet Foods* should be reversed, and Member Fox noted that the facts in *Nabors Alaska* did not present the proper vehicle for reversing *Gourmet Foods* because the 8(a)(1) threats were made by a low-level supervisor, "and the only violation with demonstrable widespread exposure in this unit of nearly 300 voters was the denial of access violation, for which the proposed remedy is well calculated to make possible a fair second election."

I decline to recommend the issuance of a bargaining order in this case, although I find that the facts here present a category one situation which, under the Supreme Court's *Gissel* decision, would warrant the consideration of a bargaining order without regard to majority status. In this regard, although the Machinists obtained a majority of bargaining unit signatures on their petition, I have concluded that several of the employees were informed in substance that the petition was for an election only. I have therefore concluded that the Machinists did not obtain majority status. Since, *Gourmet Foods*, supra, has not

been reversed, I am bound by the Board's pronouncements in that decision.[85]

In *Cogburn Healthcare Center*, 335 NLRB 1397, 1400 fn. 14 and at 1401 fn. 22 (2001), the Board stated that, "hallmark" violations that would support a bargaining order "are highly coercive violations that include plant closure or threat of plant closure, conferral of benefits, discharge, or threat of discharge, and the use of force in an attempt to discourage union activity." The Board has also found that the severity of an employer's unfair labor practices is heightened by the involvement of high-ranking officials. See *Cogburn Healthcare Center*, supra at 1401; and *Consec Security*, 325 NLRB 453 (1998), enfd. 185 F.3d 862 (3d Cir. 1999). In assessing the impact of an employer's unfair labor practices the Board will also take into account small size of a bargaining unit. See *NLRB v. Q-1 Motor Express, Inc.*, 25 F.3d 473 (7th Cir. 1994), and *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679 (7th Cir. 1982). See also *Gerig's Dump Trucking*, 320 NLRB 1017 (1996), enfd. 137 F.3d 936 (7th Cir. 1998), where the Board considered the effect of a respondent's promise of increased benefits on unit employees after they renounced the union in concluding that a bargaining order was warranted.

In the present case, with a bargaining unit of only 32 employees, on learning of the Machinists' petition for election, high-level officials Cicchini, Herlihy, and Buckley converged on the Indianapolis East and West facilities where they conducted numerous meetings, including one on one meetings with all bargaining unit employees. They solicited and promised to remedy grievances. They announced an overly generous vacation program and informed employees that they would lose those benefits if they were covered by a collective-bargaining agreement or if they selected union representation. They threatened employees with a general loss of benefits by telling them that bargaining would start from a blank sheet of paper. They disparaged the leading union adherent and created the impression of surveillance of his union activities in front of the entire bargaining unit 2 days before the scheduled election. They learned, in advance of the scheduled election that the vacation package may not be as generous as they had promised but failed to inform the employees before the scheduled election. After the Machinists' petition for election was pulled Respondent continued on its course of unlawful conduct by discharging two union supporters, one of whom was the leading union adherent who Respondent had disparaged in front of the entire unit. It could not have been lost on bargaining unit members that this employee was discharged for pretextual reasons and thereafter made to exit the facility in front of his coworkers and mocked by his supervisor as he exited the building. Thus, if the Board were to reconsider its decision in *Gourmet Foods*, supra, or disagree with my decision as to the Machinists obtaining majority status, I would recommend that a bargaining order issue in this case.

[85] See *Iowa Beef Packers*, 144 NLRB 615, 616 (1963).

CONCLUSIONS OF LAW

1. Ryder Truck Rental, Inc. d/b/a Ryder Transportation Services, the Respondent, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District Lodge No. 90, International Association of Machinists & Aerospace Workers, AFL–CIO, a/w International Association of Machinists & Aerospace Workers, AFL–CIO (the Machinists), and Chauffeurs, Teamsters, Warehousemen, and Helpers Local Union No. 135 a/w International Brotherhood of Teamsters, AFL–CIO (Teamsters Local 135) are each labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Requesting employees to report to management employees who in advocating the Machinists "harass" employees.

(b) Soliciting employee grievances and directly or impliedly promising those grievances would be remedied if they rejected the Machinists as their collective-bargaining representative.

(c) Threatening employees with the loss of vacation benefits if they voted for the Machinists, selected the Machinists as their collective-bargaining representative, or if Respondent entered into a collective-bargaining agreement with the Machinists.

(d) Informing employees that bargaining will start at ground zero like a blank sheet of paper, if its employees select the Machinists as their collective-bargaining representative.

(e) Creating the impression of surveillance of employees' union activities.

(f) Disparaging employees because of their support for the Machinists.

(g) Threatening employees with discharge because they provided testimony to the Board.

4. Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Tim Bullman and Allen Feldscher because they engaged in union activities.

5. Respondent violated Section 8(a)(1), (3), and (4) of the Act by suspending and thereafter issuing a final written warning to employee Otis Carpenter because he engaged in union activities, and because he gave an affidavit to the Board.

REMEDY

Because of the serious nature of the violations I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmont Foods*, 242 NLRB 1357 (1979).

Respondent, having discriminatorily discharged employees Timothy Bullman and Allen Feldscher it must offer them reinstatement to their former positions discharging any replacement employees if necessary, without prejudice to their rights and privileges previously enjoyed and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of Bullman and Feldscher's discharge to the date of proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[86]

ORDER

The Respondent, Ryder Truck Rental, Inc. d/b/a Ryder Transportation Services, with facilities located in Indianapolis, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requesting employees to report to management employees who in advocating the Machinists' "harass" employees.

(b) Soliciting employee grievances and directly or impliedly promising those grievances would be remedied if they reject the Machinists as their collective-bargaining representative.

(c) Threatening employees with the loss of vacation benefits if they vote for the Machinists, select the Machinists as their collective-bargaining representative, or if Respondent enters into a collective-bargaining agreement with the Machinists.

(d) Informing employees that bargaining will start at ground zero like a blank sheet of paper, if its employees select the Machinists as their collective-bargaining representative.

(e) Creating the impression of surveillance of employees' union activities.

(f) Disparaging employees because of their support for the Machinists.

(g) Threatening employees with discharge because they provided testimony to the Board.

(h) Discharging employees because they engage in union activities.

(i) Suspending, issuing a final warning, or otherwise disciplining employees because they engage in union activities or because they provide testimony to the Board.

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Timothy Bullman and Allen Feldscher full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed discharging any replacements if necessary.

(b) Make Bullman and Feldscher whole for any loss of earnings and other benefits they suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful discharge of Bullman and Feldscher, and the unlawful suspension and final warning issued to Otis Carpenter, and within 3 days thereafter, notify Bullman, Feldscher, and Carpenter in writing that this has been done and that the referenced discipline will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by Region 25, post at its Indianapolis North, East, and West facilities copies of the attached notice marked "Appendix."[87] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the three named facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at those facilities on or after December 18, 2000.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(h) IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 2, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT request employees to report to management employees who in advocating for District Lodge No. 90, International Association of Machinists & Aerospace Workers, AFL–CIO, a/w International Association of Machinists &

[86] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[87] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Aerospace Workers, AFL–CIO (the Machinists), or any other labor organization, "harass" employees.

WE WILL NOT solicit employee grievances or complaints, and directly or impliedly promise to remedy those grievances or complaints in order to discourage our employees from voting, joining, or supporting the Machinists, or any other labor organization.

WE WILL NOT threaten or inform our employees they will the lose vacation benefits if they vote for the Machinists, select the Machinists as their collective-bargaining representative, or if we enter a collective-bargaining agreement with the Machinists or any other labor organization.

WE WILL NOT threaten our employees that bargaining will start at ground zero, like a blank sheet of paper, if the employees select the Machinists, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT create the impression of surveillance of our employees' union activities.

WE WILL NOT disparage our employees because of their support for the Machinists, or any other labor organization.

WE WILL NOT threaten our employees with discharge because they provide testimony to the Board.

WE WILL NOT discharge or otherwise discipline our employees because they formed, joined, or assisted the Machinists, or any other labor organization.

WE WILL NOT suspend, issue a final written warning to, or otherwise discipline our employees because they because they formed, join, or assisted the Chauffeurs, Teamsters, Warehousemen, and Helpers Local Union No. 135, a/w International Brotherhood of Teamsters, AFL–CIO, or any other labor organization or because they gave testimony to the Board.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Tim Bullman and Allen Feldscher full reinstatement to their former positions or if those positions no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employee hired to fill the position.

WE WILL make Tim Bullman and Allen Feldscher whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days of the date of this Order, remove from our files any reference to the unlawful discharge of Tim Bullman and Allen Feldscher and the unlawful suspension of and final written warning issued to Otis Carpenter, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discrimination will not be used against them in any way.

RYDER TRUCK RENTAL, INC. D/B/A RYDER TRANSPORTATION SERVICES